

**Investigation into Environment Protection Authority
decisions on West Gate Tunnel Project spoil disposal**

May 2022

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The Victorian Ombudsman pays respect to First Nations custodians of Country throughout Victoria. This respect is extended to their Elders past, present and emerging. We acknowledge their sovereignty was never ceded.

Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973* (Vic), I present to Parliament my
Investigation into Environment Protection Authority decisions on West Gate Tunnel Project spoil disposal.

A handwritten signature in black ink, appearing to read 'Deborah Glass', with a stylized flourish at the end.

Deborah Glass OBE
Ombudsman

31 May 2022

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Foreword

“ Issues can just get out of control in the public domain. They just catch fire. ”

– Former Executive Director, EPA

Indeed they can. This was the reflection of a senior official at Victoria's Environment Protection Authority, the regulatory body charged with protecting our air, land and waterways – matters of deep concern to millions of people.

The issue that caught fire was PFAS, a class of toxic chemicals described as ‘forever chemicals’; an emerging concern around the world because of their ability to build up in the environment and in the human body.

The environment was a prime concern for the many thousands of people living near three sites approved by the EPA for the dumping of PFAS-affected spoil from the West Gate Tunnel Project.

I launched this investigation as a result of that concern. We sought to examine whether the EPA had proper regard to the principles set out in its Act – including ‘Accountability’ – and to human rights.

The EPA's job in the West Gate Tunnel Project was to ensure the environmental impact was properly considered and managed. One part of the project is the construction of tunnels involving extensive excavation of soil through Melbourne's western suburbs – including areas of previous heavy industrial use.

In June 2019, PFAS was detected in groundwater samples at several locations along the tunnel route.

This created two problems. It delayed the project and caused a cost blow-out. While the EPA was open to exploring safe reuse options for the spoil, this was dependent on further testing of the area. But further testing could not be done. The Consortium responsible for delivering the project said it could not access bores on private property or under roads, and that once the tunnel boring machines were started they could not be stopped. So tunnelling could not begin until a decision was made about spoil management.

The EPA was left in the uncomfortable position of advising on spoil management options without knowing the exact levels of PFAS in the spoil. The sheer volume of spoil to be excavated made it impossible to use existing landfill sites.

While senior officials denied there was any government interference, there is little doubt the EPA was under pressure to ‘fix’ the problem to get the project back on track.

They did so by helping the Department of Environment, Land, Water and Planning develop bespoke regulations to enable potential sites to receive the spoil. They also approved plans for three sites in Bulla, Bacchus Marsh and Ravenhall.

But community concern about PFAS meant the decision about where the spoil would end up was always going to be controversial.

Early in 2020, several community groups and agencies found out from media reports about the proposal for sites in their local areas to receive the spoil. Despite being aware of the considerable interest of community groups, the EPA had no meaningful interaction with them while it helped draft the regulations and made decisions about the plans.

Residents said they were 'left in the dark'.

People expressed concerns about 'toxic soil', including fears it might increase the risk of birth defects and terminal illness in the community, and worries about dumping it close to schools and waterways.

“ I could not sleep for weeks with worry that the soil was going to be so close not only to my children but to all of Bacchus Marsh. ”

– Bacchus Marsh Community Coalition

Such was the level of concern that two community groups started legal action in 2020 to challenge the EPA's decision. The EPA was compelled to revoke its decisions, but then approved three fresh plans for the landfill operators in early 2021. In June 2021, the Bulla site was chosen to receive the spoil, which provoked further community concern and complaints.

“ We moved to Sunbury to give our children clean, safe open spaces to grow up in ... I refuse to allow my family to be guinea pigs while we wait to see what the long-term effects of these chemicals are. ”

– Sunbury Says No community group

“ PFAS was one of those lightning rod type issues. ... [There was need] to try and get the independent information and facts out there ... to help inform people in a highly emotive context. ”

– Former Chief Executive Officer, EPA

Ultimately, we concluded that the EPA did its job according to the science. It assessed the danger was likely to be low, but adopted a cautious approach to the management of the spoil, requiring all landfill operators to safely contain PFAS at ten times the amount likely to be present in the spoil. The decisions were in fact compatible with the right to life and the rights of the child.

But it plainly failed to convince the community of this. The EPA told us consulting the community would be a 'waste of time' and that discussions 'could not be fruitful because of the level of anger in the community'. In effect, the EPA thought there was no point in consulting because it knew what the community thought. Instead, it took the approach of 'putting factual information on the website', but much of it was redacted.

This may have achieved the bare minimum required by legislation, but it led to a yawning gulf between the EPA's approach and the community's expectations of how its environmental regulator should behave. The result was a lack of trust in the EPA as an independent authority and a perception that it put political and commercial interests ahead of its duties as a regulator of environmental health.

If anything, 'lightning rod' issues such as PFAS require more, not less, engagement. The absence of information and meaningful engagement escalated the fear and anxiety in the community.

We were told the EPA 'did not have the resources' to turn around the negative public perception of PFAS. Yet it spent 'hundreds of thousands of dollars' on legal advice.

We also found the EPA did not give proper consideration, or indeed any specific consideration, to relevant human rights when making its decisions. But while human rights were not front of mind for the EPA they were very much a focus for affected communities, who were worried about the protection of their children in local schools, among other things.

Since March 2022, the EPA has tested the excavated spoil and from April 2022 it has published the results on its website. The latest at the time of writing showed levels of PFAS in line with their scientific assessment – well below the danger level.

While this must be a relief for local communities, much grief and angst may have been spared if the EPA had engaged effectively with the public from the outset and listened to them. Instead, the EPA had to be taken to court for communities to be heard. How different might the relationship have been if the EPA had truly engaged with the human rights of those affected by its decision making.

Environmental decision making is an emerging area of human rights concern, and an increasingly real concern for millions of people. All the more reason for the EPA to understand its role is not merely that of a science-based regulator, but one with significant community responsibilities.

I am pleased the EPA now acknowledges this. It says it is working hard to rebuild trust and is taking a more collaborative and transparent approach to sharing information with the community, based on what the community wants and needs to be able to participate in public life.

In addition to publishing the test results, the EPA has begun a series of monthly information sessions for the community near the Bulla site. I commend these changes and the commitment to more open and transparent community engagement.

This will, undoubtedly, not be the last 'lightning rod' project in which the EPA is involved. It seems some hard lessons have been learned – which should at least benefit future affected communities.

Deborah Glass

Ombudsman

Abbreviations

BMCC	Bacchus Marsh Community Coalition
BMG	Bacchus Marsh Grammar
Cleanaway	Cleanaway Operations Pty Ltd
Department	Department of Environment, Land, Water and Planning
EES	Environmental Effects Statement
EMP	Environment Management Plan
EPA	Environment Protection Authority
Hi-Quality	Hi-Quality Quarry Products Pty Ltd
IWR Regulations	<i>Environment Protection (Industrial Waste Resource) Regulations 2009</i>
IWR Guidelines	<i>Industrial Waste Resource Guidelines</i>
John Holland Consortium	John Holland Pty Ltd & CPB Contractors Pty Ltd Joint Venture
MBC	Maddingley Brown Coal Pty Ltd
MEG	Moorabool Environment Group
MTIA	Major Transport Infrastructure Authority
NEMP	National Environmental Management Plan
PFAS	Per- and polyfluoroalkyl substances, includes PFOS and PFOA
RIS	Regulatory Impact Statement
Sunbury Says No	Sunbury Against Toxic Soil
TBM	Tunnel boring machine
TBM Regulations	<i>Environment Protection (Management of Tunnel Boring Machine Spoil) Regulations 2020</i>
WGTP	West Gate Tunnel Project

Background

Why we investigated

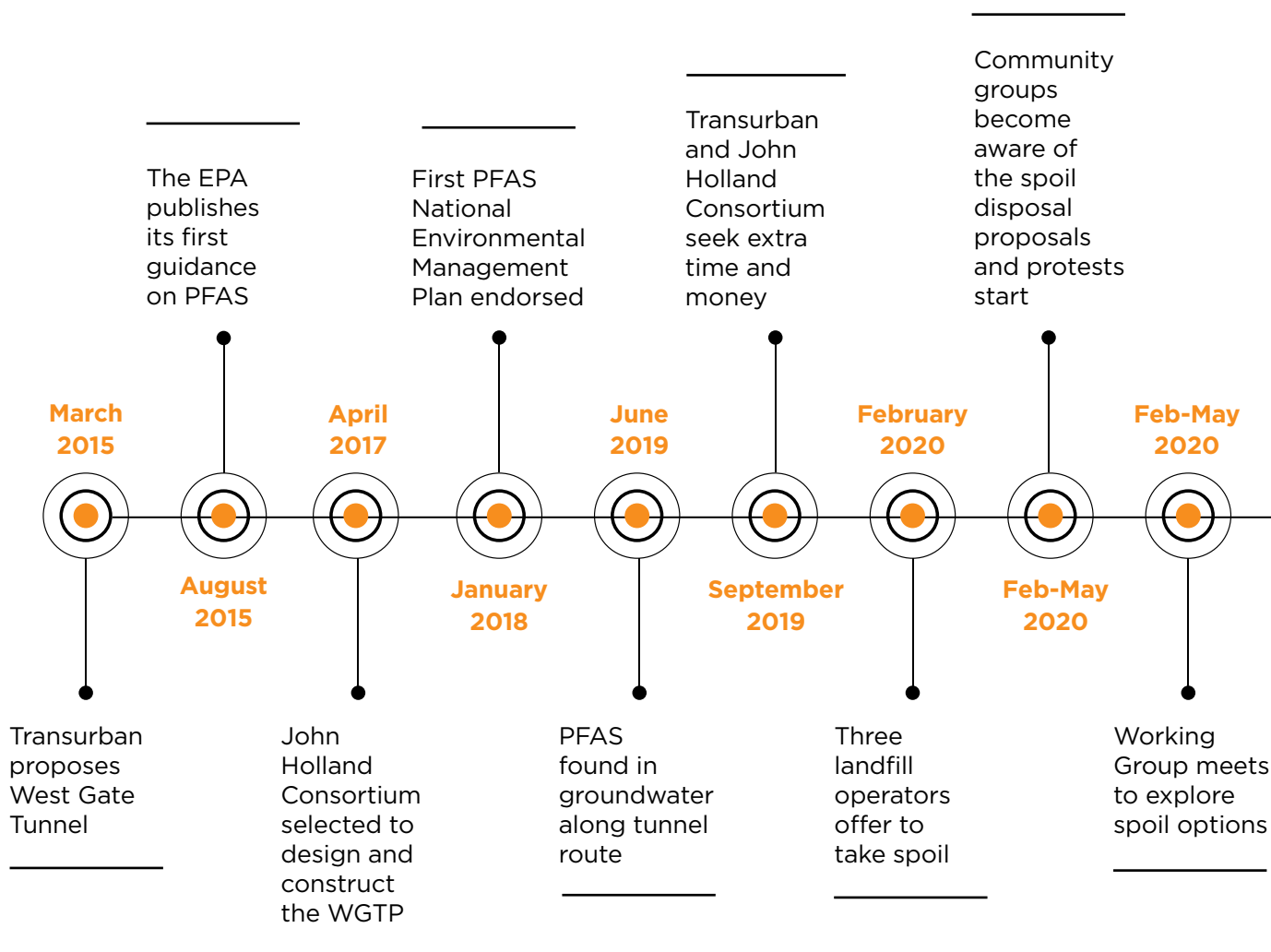
1. Community concerns about the Environment Protection Authority's ('EPA') 2020 approval of plans for three landfill sites to receive waste from the State Government's West Gate Tunnel Project ('WGTP') prompted this investigation.
2. Tunnel boring machines ('TBM') used on the project generate spoil, which can include soil, rock, sludge and water. Some of the spoil from the WGTP contains per- and polyfluoroalkyl substances ('PFAS').
3. The EPA initially approved Environment Management Plans ('EMPs') in September and October 2020 for sites in Bulla, Bacchus Marsh and Ravenhall to receive the spoil. It withdrew these approvals in December 2020 after Supreme Court challenges by community groups.
4. In early 2021, the EPA approved new plans for the same three sites to receive WGTP spoil.
5. Project builders, the John Holland CPB Joint Venture ('John Holland Consortium'), ran a tender and in June 2021 recommended the Bulla site for waste disposal.
6. After receiving complaints about the WGTP, the Ombudsman sought further information about these approvals from the EPA and the Department of Environment, Land, Water and Planning ('Department').
7. On 17 August 2021, the Ombudsman publicly announced an 'own motion' investigation into the adequacy of the EPA's decision making.

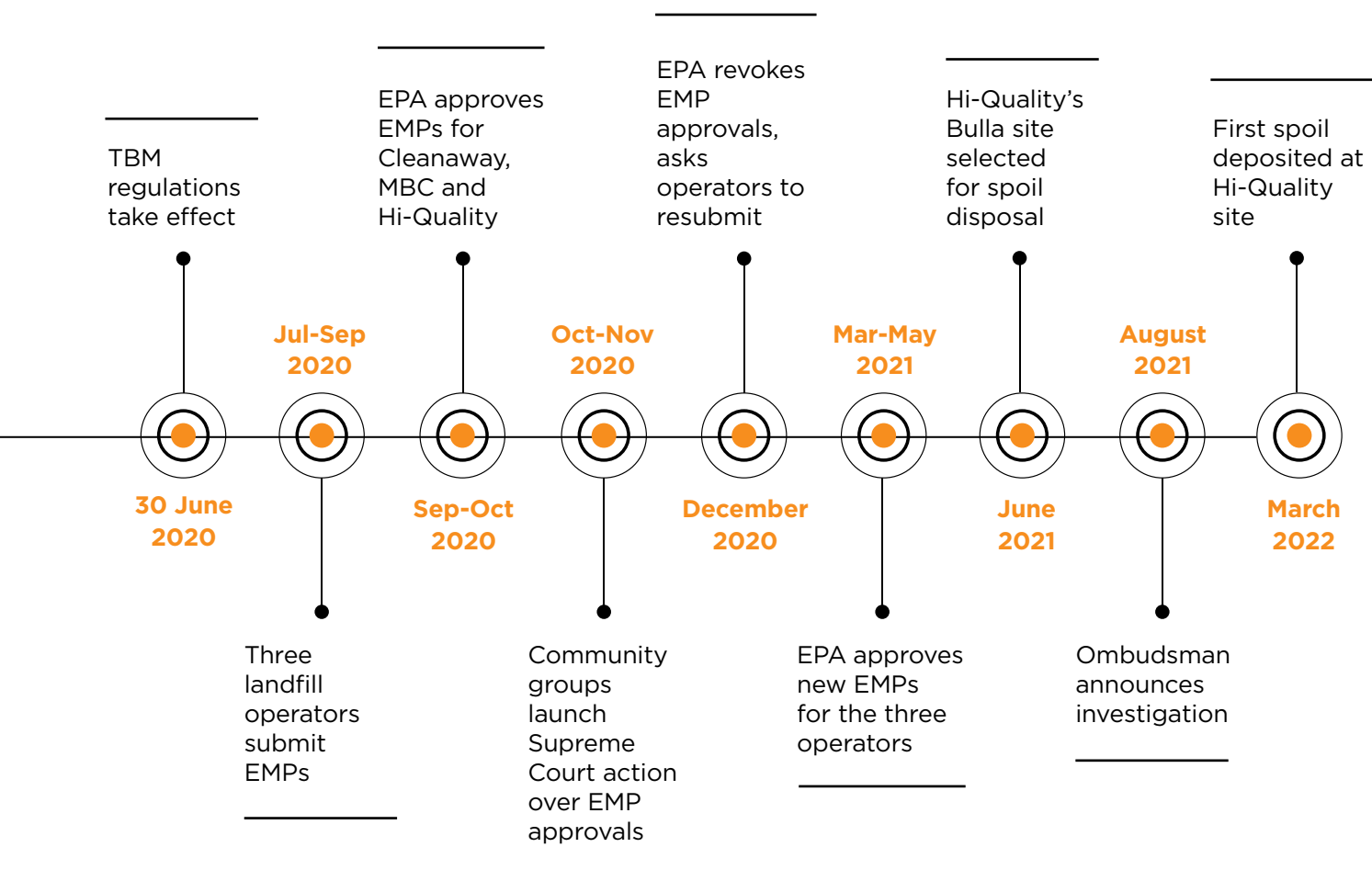
Terms of reference

8. The investigation focused on the EPA's approvals of the EMPs for spoil disposal from the WGTP during 2020 and 2021, with specific regard to:
 - the EPA's decision making and the EMP approval process for duty holders, Maddingley Brown Coal Pty Ltd ('MBC'), Cleanaway Operations Pty Ltd ('Cleanaway') and Hi-Quality Quarry Products Pty Ltd (HiQuality')
 - whether, in its decision making, the EPA had proper regard to the principles set out in the *Environment Protection Act 1970* (Vic)
 - whether the EPA acted compatibly with, and gave proper consideration to, human rights identified in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Timeline

Figure 1: Events relevant to the investigation





Source: Victorian Ombudsman

The EPA's decision-making process for managing waste

“ You'd be aware that there's a history of the Regulator that has been written, and the title of it is called *Between a rock and a hard place*. ”

– Former Chief Executive Officer, EPA

The role of the EPA

9. The EPA is an independent statutory authority that reports to the Minister for Energy, Environment and Climate Change. Its purpose is to prevent and reduce environmental harm from pollution and waste.
10. The Chief Executive Officer of the EPA at the time the decisions about the WGTP were being made has since left the role. The former Chief Executive Officer ('CEO') described the role of the EPA in these terms:

The unique thing about a Regulator is we're there as the independent decision maker ... we have a unique role to fully operate within the broader legislation and regulations and in doing so prevent harm from pollution and waste.

11. The EPA is a science-based regulator. The 2016 Victorian Government's *Independent Inquiry into the EPA* suggested 'this scientific base sets the EPA apart from other Victorian regulators', requiring the EPA to:

be capable of assessing risk to the environment and public health, of determining acceptable standards for pollution control, and of providing authoritative direction on risk management and mitigation measures.

12. The EPA is part of the Energy, Environment and Climate Change portfolio of the Victorian Government, but is separate from the Department. The EPA states that it 'works closely with its portfolio partners ... to develop environment protection policy and legislation and to deliver programs that support protection of the environment'.

Environmental legislation

13. All the EPA decisions that are the subject of this investigation were made under the *Environment Protection Act 1970* (Vic) ('1970 Act').
14. From 1 July 2018, the *Environment Protection Act 2017* (Vic) ('2017 Act') came into operation. This introduced a modernised governance structure for the EPA and created the new statutory objective to 'protect human health and the environment by reducing the harmful effects of pollution and waste'. Other aspects of the 2017 Act commenced on 1 July 2021, after the decisions relevant to the investigation were made.
15. The 2017 Act strengthened environmental protections, and revised the EPA's waste classification process with the introduction of new duties and a new waste category.
16. EPA decisions made under the 1970 Act had to accord with its stated principles of environmental protection. If the EPA failed to consider a relevant principle, the Victorian Civil and Administrative Tribunal or a court could overturn the EPA's decision.

Principles of environment protection

17. The 1970 Act's 11 principles were:
 - the principle of integration of economic, social and environmental considerations
 - the precautionary principle
 - the principle of intergenerational equity
 - the principle of conservation of biological diversity and ecological integrity
 - the principle of improved valuation, pricing and incentive mechanisms
 - the principle of shared responsibility
 - the principle of product stewardship
 - the principle of wastes hierarchy
 - the principle of integrated environmental management
 - the principle of enforcement
 - the principle of accountability.
18. In a 2014 guideline, *Application of the environment protection principles to EPA's approvals process* ('2014 Guideline'), the EPA states:

Despite the generality of the wording of the principles they are not merely aspirational or advisory ... they provide a basis for EPA to develop statutory policy and guidance to support EPA decisions ...
19. Victoria's Supreme Court recognised this in *Mount Atkinson Holdings Pty Ltd v Landfill Operations Pty Ltd*:

Parliament [intends] decision making under the [1970 Act] shall take into account the wide range of matters set out in the principles. The nature of decision making that Parliament has directed will ordinarily require the assessment and weighting of relevant factors, and the resolution of conflicting considerations. Decision making requires careful and integrated consideration of the principles of environment protection and of all relevant matters to produce the best possible outcome.
20. The EPA's 2014 Guideline states that low risk approvals are unlikely to require a 'direct application' of the principles. The principles are more relevant to 'large, complex or unusual proposals' or those with 'significant potential impacts on natural resources and the environment'.
21. Many principles are built into the EPA's processes: for example, consulting with the community as part of an approval process aligns with the principle of accountability.
22. The 2014 Guideline states that as the principles are built into many policy requirements, standards and processes, there is no need to refer to the principles directly in many assessments. The exception to this is where there are:

complicated issues or unusual circumstances that are not adequately addressed by the specific requirements of relevant statutory policies.

Principles relevant to the EMP decisions

23. Six of the principles of environment protection are particularly relevant to the EPA's decisions about the WGTP spoil.
24. The **principle of integration of economic, social and environmental considerations** requires an EPA decision maker to consider the 'overall impact of a proposal on society and the environment (rather than just the individual proponent)'.
25. The **precautionary principle** applies when an EPA decision maker identifies a threat of serious or irreversible environmental damage and there is scientific uncertainty about the possible impact. In this situation, the principle requires a precautionary, yet proportionate approach to mitigating risk.
26. The **principle of intergenerational equity** requires decision makers to take a long-term view of environmental degradation as well as considering the short- to medium-term costs and benefits.
27. The **wastes hierarchy principle** states waste should be managed in the following order: avoidance, reuse, recycle, recovery, treatment, containment and disposal. The EPA says it looks for evidence a proposal 'is at the highest level in the wastes hierarchy that allows an outcome consistent with statutory policy and best practice'.
28. The **principle of integrated environmental management** requires:

where the management of potential impacts on one environmental medium or sector (eg air, water, land) or in one aspect or area of environmental management (eg resource efficiency, risk management) has potential impacts on another medium, sector, aspect or area, EPA should look for the best overall (balanced) environmental outcome.

29. The **principle of accountability** explicitly provides that members of the public should be given 'access to reliable and relevant information' and 'opportunities to participate in policy and program development'.

Human rights

30. To comply with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter of Rights Act'), public authorities must act compatibly with human rights and give proper consideration to relevant human rights when making decisions.
31. It is unlawful for a public authority to act in a way that is 'incompatible' with human rights. Further, 'proper consideration' means:
 - understanding in general terms which rights might be relevant
 - understanding whether those rights will be interfered with by the decision, and if so, how
 - seriously considering the possible impact of the decision on a person's human rights and how this might affect the person
 - identifying other, possibly opposing interests or obligations that will need to be balanced in the decision
 - balancing competing private and public interests.
32. The EPA submitted to the investigation that the consideration of human rights is built into its decision-making processes:

The integrated assessment of the *Charter of Human Rights and Responsibilities Act 2006* is very similar to EPA's consideration of the Environment Protection Principles. That is, every approval decision made by EPA is made within the framework of the application of the Charter and the Charter forms part of the context of the regulatory regime under which any assessment is made.

33. Several rights in the Charter of Rights Act may be relevant to environmental decision making and, specifically, to the EPA's decisions to approve EMPs. These include:

- section 9 which protects the right to life
- section 17 which provides that every child has the right to be protected and to be treated in a way that considers their best interests
- section 18 which protects people's ability to participate in the conduct of public affairs, directly or through freely chosen representatives
- section 19 which protects people's ability to engage in certain types of cultural practices
- section 20 which protects people from being deprived of their property other than in accordance with law.

34. Recent court decisions and developments in international law show that environmental decision making is an emerging area of human rights concern.

35. The UN Human Rights Council passed a resolution in October 2021 recognising the right to 'a clean, healthy and sustainable environment'.

36. The enjoyment of the right to life in the context of environmental issues has also been considered by the Federal Court in *Sharma v Minister for Environment*, indicating the increasing importance of ensuring environmental decision makers are recognising and considering the impact their decisions have on human rights.

Managing contaminated spoil associated with the WGTP

37. This report details how spoil from the WGTP was identified as potentially containing per- and polyfluoroalkyl substances ('PFAS') a class of toxic chemicals, and the impact this discovery had on the management of the waste.



PFAS

Per- and polyfluoroalkyl substances are a group of manufactured chemicals in wide use globally since the 1950s. Many common household products contain PFAS to help them resist heat, stains, grease and water. PFAS has also been used in industrial products like firefighting foams and pesticides.

The chemicals are an emerging concern around the world because of their ability to build up in the environment and in people's bodies. They do not readily break down, can persist for a long time and can move long distances in the environment. For this reason they are sometimes called 'forever chemicals'.

Studies on animals have identified adverse health effects from PFAS exposure. Scientists are still learning about the potential effects of the chemicals on humans.

Governments across Australia are working to manage the potential health and environmental impacts of PFAS contamination.

38. The EPA typically refers to the solid waste produced by infrastructure projects as 'soil'. However, it describes the waste produced by the WGTP as 'spoil' because it is a combination of soil, water and rock. This report uses 'soil' when describing the standard processes for managing waste under the EPA's laws and guidelines, and 'spoil' when referring to the waste generated by the WGTP.
39. The EPA told the investigation that while it will work with a waste generator to ensure they understand regulatory pathways for management of soil, the responsibility for managing it remains with the waste generator.
40. Under the 1970 Act, several mechanisms are available for the management of contaminated soil, with two in particular relevant to this investigation:
 - classification for reuse under the *Environment Protection (Industrial Waste Resource) Regulations 2009* ('IWR Regulations')
 - works approval and licensing under section 19A of the 1970 Act.
44. Category A contaminated soil requires treatment to reduce or control the hazard before it can be disposed at an appropriate EPA licensed facility.
45. Category B and Category C contaminated soil can be accepted at an EPA-licensed landfill or facility.
46. However, the EPA advised the investigation it is common for major projects to seek a waste classification from the EPA for spoil rather than undertake standard categorisation due to the volumes and desire for certainty.
47. IWR Regulation 11 allows the EPA to classify waste and then determine management options based on this classification.
48. The WGTP was not able to undertake standard categorisation of the spoil because:
 - there was insufficient sampling of it to determine a category
 - the spoil would be generated so fast that testing the spoil once it was generated and before moving it offsite would not be possible
 - there were no hazard categories specified for PFAS contaminated spoil.

Classification for reuse

41. Waste generators are required to categorise soil according to the *Industrial Waste Resource Guidelines* ('IWR Guidelines'), a supporting document to the IWR Regulations.
42. The IWR Guidelines establish contaminant thresholds and define four soil hazard categories: clean fill material, solid inert waste, putrescible waste and prescribed industrial waste.
43. The IWR Guidelines provide upper limits on most contaminants. Contaminated soils that display any of the specific hazard characteristics are categorised as Category A prescribed industrial waste. They include explosive, oxidising, infectious and corrosive wastes.
49. The EPA issued draft classifications in September 2019 classifying the spoil as non-prescribed industrial waste, Category B and Category C waste, all with PFAS. These classifications provided various options for managing the spoil, one of which was to potentially reuse it.
50. At interview, the EPA's Executive Director of Regulatory Standards, Assessments & Permissioning from the time the decisions about the WGTP were being made ('Executive Director') explained the spoil could have been classified for reuse if the John Holland Consortium had been willing to undertake further testing of the spoil as it was being tunnelled.

51. He explained the EPA's preference was to 'permission' some, or all, of the WGTP spoil for reuse if the John Holland Consortium or any of the tendering landfill operators could develop an effective method for reusing it. However, he said there was no 'genuine reuse option' identified:

The classifications had an overarching requirement that the [Consortium] had to investigate reuse opportunities before we would allow the stuff to go to landfill ... So, after they'd looked at the reuse issue, and they decided, we can't find a reuse ... it looked to us like it was going to go to landfill.

Works approval and licensing

52. Another regulatory mechanism for managing the WGTP spoil was the works approval and licensing process.
53. Under this process, the landfill operators proposing to receive the WGTP spoil were required to apply for a works approval and licence if their proposal involved disposing of the spoil at an existing landfill, modifying an existing landfill to make it suitable, or constructing a new disposal site.
54. The works approval process had three stages:

- **Pre-application:** The applicant provided the EPA with its initial concept proposals which were reviewed, and further information was requested if required.
- **Assessment:** The EPA considered the design and operation of the proposal, best practice, and other relevant policies and guidance. If there were similar existing approved plans, the EPA may have used these as a reference. It also took into account the applicant's history and whether they were a 'fit and proper' person. The assessment stage is where community consultation could occur, including 20B conferences which occurred where a proposal had attracted significant community concern.

- **Post-determination:** After the EPA completed its assessment it decided whether to issue a works approval and whether to attach any conditions. The applicant could then undertake construction as stipulated in the works approval, and upon completion the EPA inspected the site to ensure compliance.

55. A works approval did not authorise the applicant to operate the facility. Once construction was completed, operators still needed to apply for a licence from the EPA to operate.
56. An EPA licence allows a business to run waste treatment and disposal activities. It is required for all landfill sites.
57. A licence contains conditions that aim to control the operation of the premises so that there is no adverse effect on the environment. These conditions address issues such as waste acceptance and treatment, air and water discharges, noise and odour.
58. When assessing a works approval and licence application, the EPA states that it considers whether the proposal:
- complies with specific statutory policy requirements, such as best practice, environmental standards and design criteria
 - is consistent with the aims and intents of statutory policy, such as resource efficiency, continuous improvement and the protection of beneficial uses
 - would be likely to cause pollution or unreasonable noise
 - would be likely to cause an environmental hazard
 - is cost-effective, practicable and in proportion to the significance of the potential environmental impact
 - is consistent with any relevant non-statutory guidance issued by EPA
 - is consistent with other provisions in the 1970 Act.

59. For the WGTP spoil, the proposals put forward by the three landfill operators involved the development or modification of existing landfill sites and required works approvals and licences under the 1970 Act.
60. However, the landfill operators were not required to comply with this process because the EPA assisted the Department to develop the *Environment Protection (Management of Tunnel Boring Machine Spoil) Regulations 2020* ('TBM Regulations') which were used instead.

How the TBM Regulations operate

61. Between September and October 2020, and again between March and April 2021, the EPA approved EMPs for three landfill sites west and north-west of Melbourne to receive WGTP spoil.
62. These decisions were made by the EPA under the TBM Regulations.
63. The TBM Regulations were made pursuant to section 71(ae) of the 1970 Act, which allows the Governor in Council, on the recommendation of the EPA, to make regulations for:

 exempting any persons or class of persons, any motor vehicle or class of motor vehicles, any premises or class of premises, any operation or work carried on upon any premises, or any category, type, volume or kind of waste or prescribed waste from all or any of the provisions of this Act.
64. The TBM Regulations differ from the works approval and licence process in several ways.
65. First, they exempt the operator of a TBM spoil site from the requirement to hold a works approval and licence (as required under sections 19A and 20(1) the 1970 Act) if the operator holds an EPA-approved EMP.

66. Second, they provide that section 27A(2) of the 1970 Act (which makes it an offence to deposit waste at an unlicensed site) does not apply to a person who deposits, or permits the deposit of TBM spoil at premises for which the operator holds an EPA-approved EMP.
67. Third, an affected party cannot request a review of a decision made by the EPA under the TBM Regulations by the Victorian Civil and Administrative Tribunal ('VCAT') as they could under the works approval and licence process.
68. The 1970 Act allowed a third party whose interests were affected by a works approval or licence decision to seek a VCAT review. Because the TBM Regulations exempt site operators from needing a works approval and licence, this option is not available.

Landfill levy

69. The TBM Regulations also exempted the waste generator, in this case the John Holland Consortium, from paying a landfill levy.
70. This is because the 1970 Act stated 'the holder of a licence' was required to pay the EPA a landfill levy.

Landfill operator requirements under the TBM Regulations

71. The TBM Regulations set out 20 requirements for operators seeking EMP approval for a premises.

Figure 2: EMP requirements under TBM Regulation 6(2)

(a)	A description and map of the location of the premises at which tunnel boring machine spoil is to be received
(b)	A plan of the premises identifying the location of the processing area for the purposes of regulation 5(b) and the location of the containment system
(c)	A description of the physical characteristics of the premises and elements or segments of the environment adjacent to the premises
(d)	The existing and proposed uses of the premises and elements or segments of the environment adjacent to the premises
(e)	A description of the activities to be undertaken at the premises
(f)	A description of the tunnel boring machine spoil to be received at the site
(g)	The specifications for containment of tunnel boring machine spoil at the premises
(h)	The methodology for determining if tunnel boring machine spoil meets the specifications for containment of tunnel boring machine spoil
(i)	An assessment of the risk of adverse impacts from the receipt, storage, treatment, reprocessing, containment, handling or discharge or deposit onto the premises of tunnel boring machine spoil on any beneficial uses of the environment
(j)	Management arrangements and operating conditions designed to minimise the risk of adverse impacts from the Activities on any beneficial uses of the environment
(k)	Detailed designs and technical specifications of the processing area for the purposes of regulation 5(b) and the containment system at the premises, including features intended to minimise the risk of adverse impacts from the Activities on any beneficial uses of the environment
(l)	A construction quality assurance plan for the containment system at the premises
(m)	Requirements for leachate sampling and analysis
(n)	The specifications of the qualities and characteristics of leachate that is suitable for reuse and an identification of activities for which that leachate can be reused
(o)	Details of the method to be used to measure and record the information required to be recorded and retained under regulation 5(p)
(p)	A monitoring program to demonstrate compliance with the environment management plan
(q)	Requirements for an environmental auditor to audit the risk of harm actually or potentially arising from the Activities at the frequency specified in the environment management plan
(r)	A pollution incident plan setting out how any pollution incident will be responded to
(s)	A report prepared by an environmental auditor assessing the suitability of the detailed designs, technical specifications, construction quality assurance plan, monitoring program and pollution incident plan in achieving the requirements and objectives of these Regulations
(t)	How the environment management plan is to be reviewed

Source: *Environment Protection (Management of Tunnel Boring Machine Spoil) Regulations 2020*

72. Under the TBM Regulations, operators who hold an approved EMP must ensure certain activities occur at the premises and must demonstrate how spoil will be managed and disposed of.
73. The TBM Regulations state the EPA:
 may only approve an environment management plan if it is **satisfied** (emphasis added) that the plan, together with these Regulations, adequately protects human health and the environment from the harmful effects of pollution and waste.
74. Despite the fact that the TBM Regulations are a marked departure from existing tools for regulating contaminated waste, the EPA told the investigation the regulations did not compromise or diminish any environmental protections. The EPA's Executive Director told investigators '[t]hey're a good set of regs. They're very protective and they're very proportionate to the risks involved'.
75. The EPA provided the following explanation for the Government's decision to introduce the TBM Regulations:
 The TBM Regulations provided a more proportionate form of environmental regulation to minimise risk to human health and the environment when compared to the then existing regulation of TBM spoil that would have required it to be deposited at a licensed landfill ...
 ... Given the volume and rate at which the material is extracted, it needs to be deposited at an appropriate location with sufficient space to compete the management and monitoring. Landfills do not have adequate capacity ...
 ... the TBM Regulations provided a targeted management regime via a faster, simpler process. This is less burdensome on industry without any significant economic or social burden.
76. The EPA told the investigation that as the TBM Regulations were 'activity-specific', environmental protections were strengthened, noting many of the obligations go beyond ordinary environment protection mechanisms. It provided the example of the obligation to 'dewater' the spoil, noting the works approval and licensing pathway does not provide for this. 'Dewatering' involves draining the liquid from the spoil. This removes the groundwater which is expected to hold most of the PFAS.
77. The Department, in its response to the investigation, advised that the 'unique characteristics' of tunnel boring spoil and the likelihood of similar future projects were 'central' considerations that informed the development of the TBM Regulations.
78. Other factors, such as pressure from external parties, may have influenced the development of the TBM Regulations and the EPA's management of the spoil, as discussed throughout the rest of this report.

The EPA's approach to PFAS associated with the WGTP

“ There's lots we still need to know about PFAS. ”

– Former Chief Executive Officer, EPA

The West Gate Tunnel Project

79. In March 2015, toll-road builder and operator Transurban submitted a proposal to the Victorian Government for what is now known as the West Gate Tunnel.
80. The purpose of the West Gate Tunnel is to provide drivers with an alternative route to the West Gate Bridge, and to cater for growth in Melbourne's west.
81. In December 2015, the State Government announced it would proceed with the project and established the Western Distributor Authority as an administrative office of the then Department of Economic Development, Jobs, Transport and Resources. The Western Distributor Authority was renamed the West Gate Tunnel Project on 1 January 2019. The WGTP is overseen by the Major Transport Infrastructure Authority ('MTIA'), part of the Department of Transport. The MTIA oversees other projects including the Level Crossing Removal Project and North East Link as part of Victoria's 'Big Build'.
82. On 2 April 2017, after a competitive tender process, the Victorian Government announced the John Holland Consortium would design and construct the WGTP.
83. The WGTP requires tunnelling and the extensive excavation of soil through Melbourne's western suburbs, including areas of previous heavy industrial use and the area near Coode Island. About 200 tonnes of firefighting foam were used to extinguish a fire at Coode Island in 1991. This included up to 30,000 kilograms of PFAS, much of which would have been discharged to surface water and transported from the area, but a smaller percentage would remain onsite.
84. One part of the WGTP is the construction of twin tunnels from Melbourne Road to the Maribyrnong River using two TBMs.
85. The tunnels will run under the suburb of Yarraville between the West Gate Freeway and the Maribyrnong River. The term 'tunnel alignment' is used in this report to describe the tunnel route through the ground, both vertically and horizontally.
86. The TBMs will move from the northern portals south-west towards the southern portals on the West Gate Freeway. The longer tunnel will take about 18 months to bore, working 24 hours a day, seven days a week.
87. An estimated 1.5 million cubic metres (about 3 million tonnes) of spoil will be excavated from the tunnel alignment (spoil will not be excavated from other project areas).

The WGTP's Environmental Effects Statement

88. In May 2017, the Minister for Planning appointed an Inquiry and Advisory Committee to consider the WGTP's Environmental Effects Statement ('EES'). This Committee received 504 written submissions and held public hearings from 14 August to 19 September 2017.

89. In his assessment of the EES, the Minister for Planning stated:

I acknowledge the project will generate both positive and negative environmental effects. A sound regulatory framework and environmental control regime is needed to ensure any adverse local effects of the project are effectively mitigated.

90. Relying on the Inquiry and Advisory Committee report provided to him in October 2017, the Minister stated in his November 2017 EES Assessment Report, 'considering the environmental effects overall, project approvals should be granted as the environmental effects could be managed to an acceptable level'.

91. In the EES Assessment Report, the Minister noted the project would produce significant volumes of fill, soil and rock that 'if not managed properly, could adversely affect air, water, land or human health'.

92. He said the Environmental Performance Requirements, which the project must meet during its design, construction and operation, would:

require the proponent to manage waste and spoil in accordance with the EPA's waste management hierarchy and identify opportunities for reuse of spoil. However, there will be significant volumes of spoil that will require treatment or disposal at appropriately licensed waste management and disposal facilities.

93. The EPA advised the investigation that the Environmental Performance Requirements were included based on its advice.

94. The Minister's EES Assessment Report was informed by technical reports. One of these was the *Impact Assessment Contaminated Soil and Spoil Management* report prepared by Golder Associates, dated 9 May 2017 ('Golder Report').

The Golder Report

95. The Golder Report was included in the EES and used existing public data plus information gained from soil and groundwater field investigations. Its objective was to determine what contaminants were likely to be encountered and what 'control measures would be required to protect public health and the environment from these contaminants'.

96. The Golder Report stated 'soil beneath some areas of the [WGTP] alignment is likely to be contaminated by substances or waste from historical industrial operations'. It noted potential for such contamination to migrate down through rock to underlying groundwater.

97. The report concluded the concentrations of arsenic and nickel in the soil tested were above the upper limits of clean fill material which meant they were potentially contaminated. The report also concluded there were 'exceedances' of fluoride, copper, hexavalent chromium, zinc and mercury.

98. The Golder Report's authors acknowledged it had a significant limitation – it was intended as a guide only. More detailed investigations of the soil were intended to occur later on, during project design and construction.

99. Another limitation of the Golder Report was that it did not test for PFAS in the soil. It suggested that 'should PFAS be identified in the spoil, advice should be sought from the EPA on appropriate classification and disposal requirements'.
100. A news article dated 13 May 2020 quoted University of New South Wales environmental engineer Associate Professor Robert Niven as saying the exclusion of PFAS soil samples from the Golder Report was an 'important omission':
- They've tested for a large suite of different classes of chemicals, there's no reason why they couldn't have included PFAS in that list.
104. In January 2018, the first PFAS National Environmental Management Plan ('NEMP') was produced. It was developed by the Heads of EPAs in Australia and New Zealand. The NEMP was the first national guidance provided to environmental decision makers about managing PFAS, and the EPA told the investigation it took a leadership role in its development.
105. The NEMP states it is guided by the principles of sound environmental regulation agreed to by all heads of government of the Commonwealth, States and Territories of Australia in the 1992 *Intergovernmental Agreement on the Environment*. These principles include the precautionary principle, intergenerational equity and the conservation of biological diversity.

The EPA's PFAS guidance

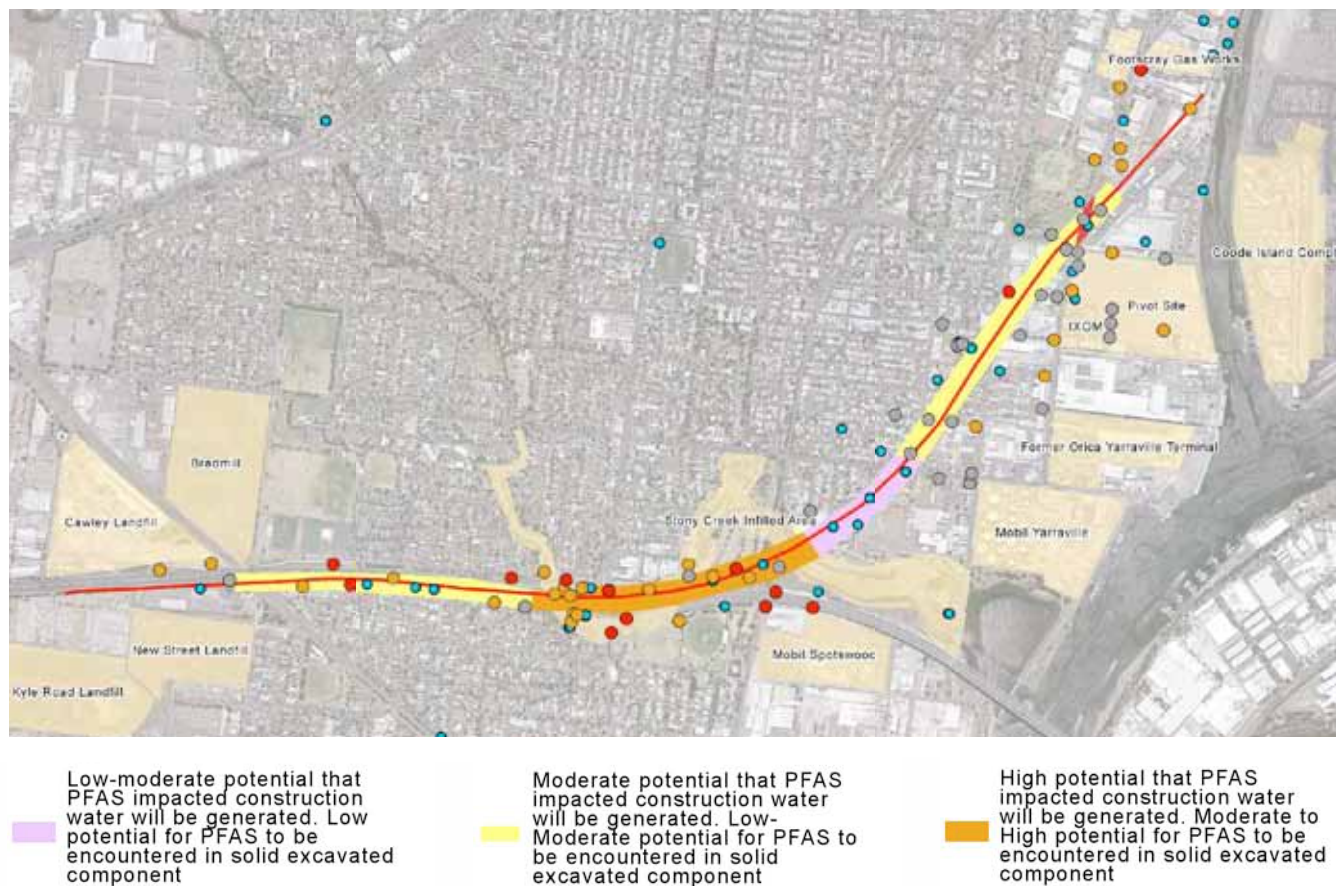
101. The EPA told the investigation that PFAS emerged as a contaminant of concern for environmental regulators in the early 2000s and from this time, the EPA became actively involved in efforts to determine the risks to human health and the environment. It first published guidance on PFAS in August 2015.
102. In October 2016, the EPA conducted a preliminary assessment of industries and sites where PFAS has existed as a contaminant and from 2017 released the first of a series of interim position statements. In its November 2017 *Interim Position Statement on PFAS*, the EPA did not specify how to classify PFAS contaminated soil. It said it would later determine acceptable levels of PFAS for landfill disposal.
103. In May 2017, when the Golder Report was prepared for the Minister, the relevant IWR Guidelines did not provide specific hazard thresholds for PFAS.
106. Importantly, the NEMP provided environmental authorities for the first time with 'guideline values' of acceptable levels of PFAS in water and in landfills. Authorities could use these values to assess potential human health risks and inform decisions. Prior to this, the EPA and other environmental regulators had applied internationally recognised values.
107. The NEMP also guided regulators on when it might be acceptable for a regulator to approve the reuse of PFAS-contaminated soil. It did not provide specific values, but detailed several factors that should be considered. Among these were whether the receiving environment already contained PFAS, and the proximity of the site to areas such as farms, groundwater dependent ecosystems and sensitive animals.

108. In its August 2018 *Interim Position Statement on PFAS*, the EPA said it supported and had adopted the NEMP. It also stated:
- the EPA continues to take a precautionary approach to PFAS as it is persistent, accumulative and mobile
 - PFAS contaminated liquids, solids and sludges destined for storage or treatment will be tracked using a specific waste code
 - solid waste destined for landfill will be controlled through the use of a classification. Landfill disposal of solid waste must only occur after submitting a classification application to EPA for approval.
109. The interim position statement did not adopt a position on safe levels of PFAS for reusable soils.

PFAS found in the WGTP groundwater

110. The John Holland Consortium's March 2018 *Soil and Spoil Management Plan* predicted over 95 per cent of the soil and spoil generated from the WGTP would meet the EPA's clean fill material criteria.
111. However, in June 2019 the Aurecon Jacobs Joint Venture, selected to carry out the engineering design of the WGTP, prepared a report titled *Conceptual Site Model of Ground to be Tunnelled* ('Ground Report') for the John Holland Consortium.
112. The purpose of the Ground Report was to provide the 'contamination status of the ground to be tunnelled in order to inform the management of excavated material and consider off-site disposal options'.
113. It did not sample rock and soil for PFAS at the depth of the tunnel, only groundwater. However, it stated that:
- the levels of PFAS detected in the groundwater represent a risk in the ground to be tunnelled, because of the water component (potentially regarded as the leachable component) along the whole alignment.
114. This is because, according to the Ground Report, 'PFAS is a persistent and mobile substance with the ability to migrate through the environment'.
115. As shown in Figure 3, the entire tunnel alignment was considered by the Ground Report to be contaminated with PFAS to some degree.
116. The Ground Report identified PFAS in the groundwater across the project area at concentrations ranging up to 9.7 micrograms per litre (well above the safe recreational water level value for PFAS as defined in the NEMP). These levels were identified in areas that would not be subject to tunnelling.
117. PFAS was found in the groundwater at several points along the tunnel alignment itself, in concentrations ranging up to 0.7 micrograms per litre.
118. Applying the NEMP criteria, spoil containing this level of PFAS would require disposal in a lined landfill.
119. The EPA's Executive Director expressed the view that the amount of PFAS at the depth of the tunnel alignment was likely to be far less than the amount detected in the groundwater samples because 'you're further from the source'.

Figure 3: Concentration of PFAS detected in each of the four project zones of the tunnel alignment



Source: Victorian Ombudsman based on *Conceptual Site Model of Ground to be Tunnelled*, 7 June 2019, Aurecon Jacobs Joint Venture

120. Explaining what he considered to be the main sources of PFAS in the tunnel alignment, he said:

We know along the tunnel alignment there are probably about three key sources of PFAS. One of those would be Coode Island, which is about a kilometre away ... there's another site which is the Terminal Facility at Yarraville where they offload fuel. We know that there is PFAS at that site and they still use PFAS today as their key firefighting technology at that site. The other site is at the other end, the Bradmill Textile Mill. We know that PFAS is very commonly used in textile manufacture and likely they've had some spillages over the 35 years.

121. However, he said that didn't mean that the spoil to be tunnelled was going to contain as much PFAS as the sampled ground water. He said:

So, you'd expect to find PFAS throughout the western suburbs at ground level. You would not expect to find it 40 metres underground, and as I say, the further you get from these sites, either you know, in terms of distance or in terms of depth, the readings are going to diminish to nothing at that sort of 40 metre depth.

122. In response to a draft version of this report, the EPA told the investigation its understanding is that over 70 per cent of the groundwater results were identified as containing less than 0.07 micrograms of PFAS per litre. It also said due to the depth of the tunnel alignment, it is not anticipated there will be PFAS in rock, but rather the PFAS from the groundwater will be mixed with the sludge generated from drilling. The EPA noted the spoil would be 'dewatered' at several points following the tunnel boring. As such, the concentrations in the groundwater were likely to provide an overestimation of the concentrations in the spoil by the time it reached the chosen site.

Insufficient sampling

123. The Ground Report did not sample the spoil in the tunnel alignment for PFAS levels, only the groundwater. The Executive Director said the EPA would have preferred for the John Holland Consortium to get more testing done, including soil samples and further groundwater samples. He said 'our view was the sampling was insufficient'.

124. However, he said he was told by WGTP officers it was not possible for the John Holland Consortium to take further samples, as it could not access the bores on private property or under roads.

125. The EPA then proposed the John Holland Consortium begin excavation of the tunnels and start testing the spoil more thoroughly once it was moved to the chosen site. The Executive Director told the investigation:

Now, apparently that wasn't possible either. They argued that [tunnel] boring machines could never stop, and they operate at such a rate and the throughput was so great, and they couldn't get testing [completed] in time

126. The investigation understands because the TBMs could not be stopped once started, the John Holland Consortium believed tunnelling could not begin until a decision was made about spoil management. This position was confirmed in an inter-agency briefing on 6 September 2019:

There is a risk to the launch of the TBM (currently scheduled for 16 September 2019) if [the John Holland Consortium] does not have confidence that there are sufficient long-term spoil management solutions in place to accommodate re-use or disposal of expected spoil volumes.

127. The investigation also notes that because of this insufficient sampling and challenges associated with stopping and starting the TBMs, the exact levels of PFAS in the spoil was not confirmed.

Classifying the spoil

128. The Executive Director explained that because of the insufficient sampling conducted by the John Holland Consortium, the EPA made a 'very conservative assumption' and said to the Consortium:

Well, if you can't give us any more information and you can't test it when it comes out of the ground, we need to treat it as if it's all contaminated.

129. As noted earlier, the IWR Guidelines do not specify a hazard category that classifies PFAS contaminated soil.

130. In such cases, the Guidelines state:

If the waste contains a contaminant that is potentially poisonous (acute), toxic (delayed or chronic) and/or ecotoxic and the contaminant **is not listed** (emphasis added) in [the IWR Guidelines] the waste generator must apply to the EPA for a determination of hazard category.

131. The EPA issued initial classifications for the spoil from the west zone of the project in December 2018 and May 2019.

132. In the absence of further sampling, the EPA then issued three classifications to the John Holland Consortium for WGTP spoil, based on available information. These classifications were non-prescribed industrial waste, and Category B and C waste, and were valid for three years from 13 September 2019.

133. On 28 August 2019, the John Holland Consortium advised the MTIA of the estimated amount of each type of spoil.

134. Figure 4 shows that most of the spoil, 1,580,000 m³, was expected to fall into the category of clean fill material or non-prescribed industrial waste and PFAS.

135. The EPA told the John Holland Consortium for this category of soil:

Where that soil is not IWRG waste category B or C, and is below the upper limit for unlined landfill type in the NEMP landfill acceptance criteria, EPA expects that the waste hierarchy is considered. This means that reuse options **must be further explored** (emphasis added) and, where viable reuse options are identified, applications to EPA should be submitted with an appropriate risk assessment (via a soil management plan).

Figure 4: Estimated amount of spoil per waste classification

Waste classification	Estimated spoil volume (m ³)
Clean fill material or non-prescribed industrial waste	150,000
Clean fill material or non-prescribed industrial waste + PFAS	1,580,000 (1,200,000 from the tunnel and 380,000 from the east and west zones)
Category C + PFAS	40,000
Category B	3,000
Category A	1,000
Total	1,774,000

Source: Department of Premier and Cabinet draft briefing on WGT spoil, 6 September 2019

The EPA's views on reusing PFAS-contaminated soil

136. The Executive Director explained the EPA's approach to the reuse of PFAS contaminated soil was developed after the release of the NEMP and drew on research by its own Chief Environmental Scientist:

The EPA undertook its own research ... which investigated potential options for reuse of PFAS. PFAS partitions to water so you want to keep water away from it ... [but] if you can use it under a road, in an embankment, or a long way from a receiving environment like a creek, you can reuse [soil with] very high levels [of PFAS] if they're safely contained.

137. Consistent with this, soon after classifying the WGTP spoil, the EPA issued its October 2019 *Interim Position Statement on PFAS* and adopted a position on the reuse of soil containing PFAS for the first time. It said: '[the] EPA adopts an interim position on the reuse of soil which may contain PFAS of 0.004 mg/kg in soil'.
138. In October 2020, the EPA issued another Interim Position Statement on PFAS which was near-identical to its October 2019 version and referenced the NEMP 2.0 and the EPA's support for it.
139. Despite the Executive Director's statements that the EPA had evolved in its approach to the reuse of PFAS contaminated soil since 2017, the CEO told the investigation a precautionary approach to PFAS was still appropriate:
- I haven't kept up over the last year on this, but if you ask, 'is that currently the situation?', I'd say yes ... there's lots we still need to know about PFAS.

Community views on PFAS

140. Community groups living close to the proposed landfill sites told the investigation they did not agree with the EPA's characterisation of PFAS-contaminated soil as being safe enough to reuse, or share the EPA's confidence it could be safely contained.
141. As well as voicing concerns about the potential for environmental contamination, the groups highlighted fears about the effects of PFAS on human health and its unknown long-term effects.
142. The Moorabool Environment Group ('MEG') is an advocacy group from the Bacchus Marsh area – one of the three proposed landfill sites. MEG monitors threatened wildlife and environmental issues in the local area and has been monitoring MBC's activities since 1999. It said although scientific knowledge of the risks posed by PFAS was continuing to develop, it was:
- ... beyond doubt that (a) it is a forever chemical that does not break down in the environment, (b) instead it accumulates in the environment therefore having implications over many generations, (c) it is highly soluble and movable in water, and (d) its effects on human and environmental health are detrimental.
143. Bacchus Marsh Grammar, an independent primary and secondary school with 2,300 students, has a campus which is approximately 220 metres north of the boundary of the MBC site. It held concerns about the potential effects of PFAS in children:
- The effects of PFAS on the human body, and in particular on children, is a very contentious issue ... The EPA itself admits that we still don't know everything about how PFAS affects human health, and studies have suggested that exposure to PFAS can affect childhood development.

144. Public comments to Hume City Council also raised concerns about the 'toxicity' of the spoil, including concerns that PFAS-contaminated spoil might increase the risk of birth defects and terminal illness in the community. Another comment likened the current understanding of PFAS to how we once understood the risks of asbestos exposure:

The very real feeling of history repeating itself is apparent when talking about PFAS and the damaging effects of asbestos: "It was safe until it wasn't".

145. Community concerns were exacerbated by the perception held by many that it was highly likely that leachate from the spoil would contaminate local waterways.
146. Many people expressed concern that PFAS would eventually make its way into the food chain. They emphasised the solubility of PFAS in water and the potential for it to accumulate in agricultural crops and subsequently in humans and animals.
147. While the perceived poor impact on human health was the main concern held by community groups, they also worried about the impact on unique environments.
148. Many of the concerns about threats PFAS posed to the environment were site-specific, regarding closeness to waterways and the potential impact on species of animals. These are detailed further in the next chapter.

Issues created by the discovery of PFAS

149. Emails provided to the investigation show that the discovery of PFAS in the groundwater and the EPA's classification of the spoil created two significant issues for the State Government.
150. The first issue was that Transurban and the John Holland Consortium sought more money and time. They lodged contractual claims with the Government in September 2019. According to a briefing document dated 6 September 2019, in the claims:
- [Transurban and the John Holland Consortium] is alleging that the release of guidance and policy materials by the government which regulate how PFAS contaminated soil, and the subsequent issue by the EPA of waste disposal classifications are Project-specific changes in mandatory requirements or a change in policy which Project Co is legally obliged to comply with.
 - [Transurban and the John Holland Consortium] alleges that these changes could not have been reasonably foreseen at Contract Close on 11 December 2017 ... and that compliance with these changes will increase costs and delay Project completion.
151. According to the briefing document, Transurban and the John Holland Consortium were seeking an estimated cost increase of several billion dollars and a significant time extension.

152. The EPA Executive Director explained the situation:

What I was told through the West Gate Tunnel Project, is that the contracts [for the WGTP] were signed late December [2017] ... then within days of the contracts being signed ... the National Environment Management Plan for PFAS was released and adopted by EPA Victoria. So, you can see there that they perceived a contractual issue apparently, because of the adoption of the ... PFAS NEMP. So apparently, they were only days apart. I mean, we had no idea obviously when contracts were being signed. [We were] completely oblivious to that ... an opportunity I guess presented itself in terms of a perceived change to standards, and the matter went from there.

153. The second issue facing the State Government was that no genuine reuse options for the spoil had emerged. This raised the possibility all the spoil would have to be disposed of in commercial landfills, which could disrupt municipal waste collection.

154. In an email dated 19 July 2019, the Executive Director described the situation:

- PFAS contaminated spoil has been detected from the spoil at the western portal where they have dug to insert the tunnel boring machine (TBM).
- WGTP anticipate more PFAS when the TBM commences (scheduled late August)
- The subcontractor has applied to take this spoil to landfill – there are vast quantities which jeopardises landfill airspace and may require round-the-clock landfill access
- Given low levels of PFAS detected to date, EPA is open to a ‘reuse’ option rather than landfilling.
- The subcontractor has NOT applied for a reuse option

- Implications are very high cost for major infrastructure projects from landfill levy, risks of landfill airspace, risk of displacing [Municipal Service Waste], risk of community backlash if reuse options are pursued, inability to find locations for 24/7 depositing of spoil.

- **The issue is already concerning Ministers** (emphasis added).

- My preference is to come together as a portfolio to ensure that the ‘waste system’ doesn’t become the factor that **jeopardises the cost and timing of these major infrastructure works** (emphasis added).

155. Investigators asked the Executive Director to explain the context of this email. He said he was trying to express the extent to which the disposal of the spoil into current landfills was ‘a dumb idea ... [and] a poor solution all round’. He said:

If you look at it through the lens of an infrastructure project, you’re incurring a levy ... If you look at it through the lens of the community and our access to putting things in our garbage bin, the risk to landfill space is very significant.

156. He said the reference in the email to the issue ‘already concerning Ministers’ was to the wider ‘political issue’ that would result if the disposal of this waste started ‘to jeopardise the ability to collect garbage in Melbourne’.

157. He further explained:

if you’re competing for the same landfill space ... who do you give priority to? Do you give it to municipal garbage collection or West Gate or North East Link Project or whatever other major projects? [The landfills] are busy all day round, so already waste from the surface level at West Gate Tunnel, waste from Metro Tunnel ... You lay on top of that 3,000,000 tonnes of new dirt and you’ve got chaos at landfills.

158. The disposal of the spoil into existing landfills would have had the additional drawback for the John Holland Consortium of attracting a landfill levy.
159. A briefing forwarded by a Department of Premier and Cabinet Executive Director to the Department of Environment, Land, Water and Planning's Secretary, the CEO and other Department officers on 6 September 2019 expressed concern that:

this option will attract significant disposal fees and levy costs, which [Transurban] and the [John Holland Consortium] may seek the State to contribute to or pay for in order to proceed.
160. By the end of 2019, the John Holland Consortium and the EPA were at an impasse as to the preferred option for managing the spoil from the WGTP. Tunnelling works could not begin until this impasse was resolved.
163. Groundwater sampling along the tunnel alignment suggested at least some of the spoil could contain PFAS levels low enough to allow reuse. In issuing project classifications, the EPA therefore made it a requirement that the John Holland Consortium explore reuse as an option.
164. However, according to evidence given by the Executive Director, the John Holland Consortium said it was unable to accommodate further sampling or to stop and start the TBMs in order to test the spoil as it was being excavated. No genuine reuse option for the spoil was identified.
165. By the end of 2019, the John Holland Consortium and the EPA were at an impasse as to the preferred option for managing the spoil from the WGTP, and tunnelling works couldn't begin until this impasse was resolved.

Conclusions about the EPA's approach to PFAS and the waste from the WGTP

161. When the original environmental approvals were given to the WGTP by the Minister for Planning in 2017, technical reports warned soil in the project area was likely to be contaminated from historical industrial operations. However, the amount of PFAS in the soil was not measured at that early stage.
162. In October 2019, the EPA adopted an interim position that this waste could be reused if it contained 0.004 micrograms of PFAS or less. However, the EPA's position on the safe reuse of contaminated soil appeared to be markedly at odds with public perceptions of PFAS.

The development of the TBM Regulations

“ I thought it was an outrageous situation driven by the contractual arrangement, rather than an environmental arrangement. ”

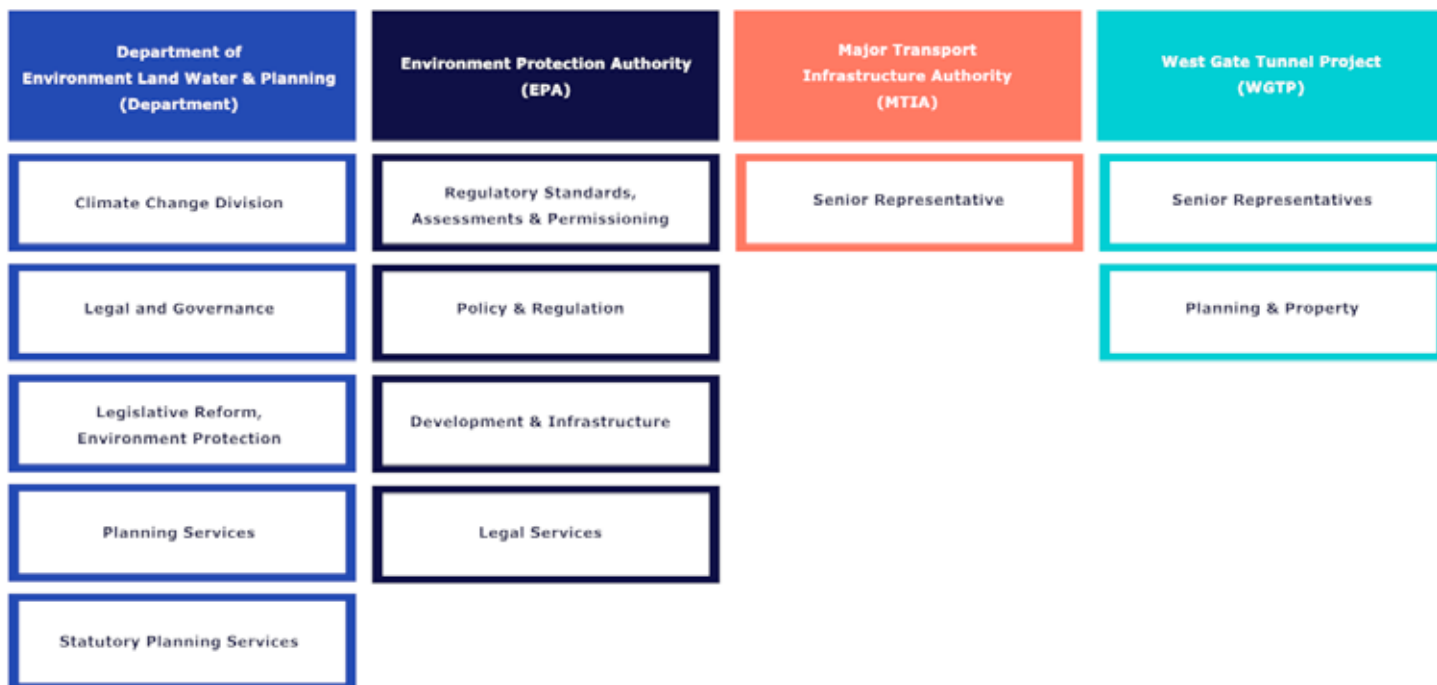
– Former Executive Director, EPA

Initial inter-agency discussions

166. People from various agencies began discussions in August 2019 about possible options to resolve the issues facing the WGTP and the State Government.
167. With the disposal of the spoil into existing commercial landfills considered an unsuitable option, the possibility of developing a new disposal site was raised.
168. A 6 September 2019 briefing paper said the Department had prepared planning and EPA approvals for the Mitchell Lasry Quarry in Tullamarine, a Government-owned site. The benefit of this proposal was it included a rehabilitation project and had ‘potential to avoid landfill disposal fees’.
169. However, the estimated time to ready the Mitchell Lasry Quarry site to receive spoil was two to three months, which was considered ‘outside of WGTP timeframes’. The paper also noted ‘sensitive stakeholder issues’ around the quarry site, including with the Hume City Council, the Friends of Moonee Ponds Creek, and nearby residents.
170. In an email to the Department Secretary on 9 August 2019, the CEO explained:
- [the] transport portfolio are looking for candidate locations such as disused quarries capable of taking up to 3m tonnes of spoil from a tunnel boring machine. The spoil may contain very low levels of PFAS contamination. However, EPA would assess each site and issue a statutory permission confirming that it is suitable for reuse at the proposed site.
171. The CEO attached a spreadsheet of ‘relevant considerations’ to this email, which included:
- Will disposal at this location meet [John Holland Consortium] budget and commercial constraints?
 - Is the site EPA levy free?
 - Is the site free from ongoing environmental risk?
 - Is NEMP compliance achieved?
 - Are the sites boundaries at least 500m from residential premises, childcare and education centres?
 - Is this site not expected to be susceptible to complaints?
172. The investigation asked the CEO to explain the EPA’s role in these inter-agency discussions. She said the EPA’s role was to share ‘factual information about the different option pathways’ and the ‘factual implications’ associated with them.
173. Asked whether the EPA would routinely be involved in discussions about the commercial risks or issues facing a private entity like the John Holland Consortium, she said:
- that kind of factual information ... what sort of thing attracts a levy and what doesn’t ... I guess, they’re facts that a regulator needs to share.
174. Another option discussed by inter-agency representatives in the 6 September 2019 briefing was the EPA reviewing its August 2018 *Interim Position Statement on PFAS* to ‘adjust the requirements’ and set new contamination thresholds for PFAS so that the spoil could be sold as clean fill materials.

175. This option, if adopted, would have avoided the need for the WGTP spoil to be reused or even disposed of in landfill, resolving most of the consortium's and government's concerns.
176. The investigation asked the CEO about this option as a possible solution to the issues the State Government was having with the John Holland Consortium. She responded:
- The EPA, as the independent regulator, we would only ever go based on science. I don't believe as a regulator we ever compromised that or that we ended up with any kind of option that compromised that in any way.
177. However, the investigation notes the inter-agency group asked the EPA to change its position on PFAS in clean fill material. The EPA rejected this proposal. In its response to a 26 August 2019 email, the EPA advised the other agencies 'there is no "clean fill" level [of PFAS] in Victoria or any other state' and the inclusion of PFAS in 'any "clean fill" classification will be a national first in Australia and will put Victoria out of step with other jurisdictions'.
- ## The options considered for regulating the spoil
178. In February 2020, the John Holland Consortium held a tender process for landfill sites and received offers from three landfill operators: MBC, Hi-Quality and Cleanaway. All three proposed using sites adjacent to their existing landfills to hold the PFAS-contaminated spoil in containment cells.
179. On 10 April 2020, the John Holland Consortium advised that it couldn't proceed until each landfill operator obtained EPA approvals.
180. With alternatives explored and dismissed by inter-agency representatives, the onus shifted back to the EPA to identify pathways available under the 1970 Act to approve the three sites. One option was to develop a regulatory alternative that would allow the EPA to provide approvals to the three landfill operators.
181. Documents show that the EPA raised the need to form a Working Group to consider a regulatory response. The Working Group included:
- Department legal and policy staff
 - EPA legal and policy staff
 - Senior representatives of the MTIA and WGTP
182. In response to a draft version of this report, the EPA advised that while it actively participated in inter-agency discussions to resolve the issues around WGTP spoil, it disputed that it formed a Working Group with permanent participants, or led the resolution of the issues.
183. From February to May 2020 the Working Group explored five alternative regulatory options to determine the most timely and proportionate way to deal with the spoil.
184. The five options considered by the Working Group were:
- to classify the waste so it could be reused rather than disposed
 - to issue 'emergency orders'
 - to amend the 1970 Act
 - to make an interim waste management policy
 - to make regulations exempting the sites from works approval and licence requirements, provided they submitted EMPs that addressed the specific requirements of the regulations.

Figure 5: Key participants in the inter-agency Working Group



Source: Victorian Ombudsman

185. The EPA, WGTP and landfill operators all sought independent legal advice on the relative benefits and limitations of these options. The EPA Executive Director told the investigation the EPA spent ‘hundreds of thousands of dollars on external legal advice’ about the WGTP spoil.
186. By the end of April 2020, the Working Group decided that issuing emergency orders, making an interim waste management policy or amending the 1970 Act were not suitable options.
187. These options were dismissed because the Working Group needed a solution that could be implemented quickly and could withstand judicial review.
188. This left the two options of either classifying the waste so it could be reused, or making specific regulations to exempt the sites from the works approval and licensing requirements of the 1970 Act.
189. The investigation understands the EPA continued to press for the classification option. An email on 19 April 2020, sent by a representative of the EPA stated it was ‘still minded to focus on classification as the preferred regulatory pathway but is facing pressure from the Minister’s Office’. The email stated both the WGTP and the landfill operator were ‘pushing for’ the regulation option.

“[The EPA is] still minded to focus on classification as the preferred regulatory pathway but is facing pressure from the Minister’s Office.”

– EPA representative

190. Asked about the context for the 19 April email, the EPA Executive Director said:

all the way along the builder has wanted 100 per cent certainty, which is very unusual in my experience. They saw, I guess a risk of using an instrument like a classification, and that didn't give them 100 per cent certainty, so they were looking for something else

The classification option

191. Legal advice provided to the WGTP on 3 April 2020 might explain why the Working Group decided against classification as the preferred option.

192. The advice explained that a proposal from one of the landfill operators to put the spoil in a containment cell could not be classified as genuine reuse. Courts have interpreted genuine reuse to mean having a beneficial purpose which the proposal from the landfill operator did not have.

193. The investigation understands that as the landfill operator's proposal was more like 'disposal' (which would require a works approval and licence), the classification option would not have fixed the problems that were concerning the John Holland Consortium, including having to pay a landfill levy.

The regulation option

194. Emails provided by the Department show that by 20 April 2020, the EPA was considering the feasibility of the regulation option. An email from the EPA Policy & Regulation team to the Department stated:

[The CEO] asked yesterday if making a regulation as they requested in the previous advice was feasible ... Last night [we] advised [the CEO] it was not clear how such a regulation might work and advice from [the Department of Premier and Cabinet] would be necessary ... [The CEO] was very keen to explore as a way to settle this and avoid challenge today

195. After receiving further independent legal advice on 28 April 2020, the EPA appeared to accept that classification was not a viable solution, and that creating new regulations was the only workable option.

196. The Working Group agreed to adopt the regulation option. This involved drafting regulations exempting the landfill operators from having to hold works approvals and licences to dispose of the spoil, on the condition they submitted EMPs that addressed specific requirements.

197. The EPA's legislated role was to recommend the making of regulations under the 1970 Act. Developing the TBM Regulations was the Department's responsibility. The Department told the investigation it needed to consult with the EPA and the MTIA in order to do this.

198. The main benefits of the regulation option were described in legal advice dated 3 April 2020:

First, it would appear able to be utilised relatively quickly in comparison to some of the other options identified ...

Second, there are no express constraints on the power, meaning that it is likely to be more difficult to successful[ly] challenge the making of a regulation, should someone wish to do so.

199. Further legal advice suggested the regulations could be implemented even more quickly if the Premier or Minister exempted them from needing a Regulatory Impact Statement ('RIS'). An RIS allows parliamentary and public scrutiny of a proposed regulation.

The effect of an RIS on community consultation

200. The Department and the EPA began drafting the TBM Regulations on 11 May 2020, and various drafts were reviewed over four weeks. Emails from this period show the Department and the EPA aimed to have the TBM Regulations drafted, reviewed, finalised and operating by 1 July 2020.

201. The *Subordinate Legislation Act 1994* (Vic) requires a Minister to determine whether a proposed statutory rule imposes a 'significant economic or social burden on a sector of the public'. If there is a significant burden, a RIS should be prepared. If there is no significant burden, the Minister can issue an exemption certificate.

202. This Act also requires a Minister to certify that the proposed regulations do not limit any human right set out in the Charter of Rights Act.

203. Emails between the Department and the EPA in May 2020 show officers discussed the justification for exempting the TBM Regulations from a RIS for several weeks before satisfying themselves that the TBM Regulations would not create a significant burden on any sector of the public.

204. However, some officers remained concerned that the exemption could create a 'political risk' for the Minister. In an email dated 14 May 2020, an officer from the Department's Environment Protection team wrote:

There is still more work to be done to show no significant burden from removal of current community consultation and appeal rights through base case. If there is any uncertainty – requirement is for consultation. Any uncertainty or lack of detailed thought and analysis creates political risk as Minister must sign the certificates.

205. The Department told the investigation it and the EPA were ultimately satisfied there was no significant burden on any sector of the public because the decision was 'made against' the alternative case of sending spoil to existing landfills. The Department said that option would have required the spoil to be disposed at a licensed landfill, 'imposing unnecessary costs on the community'.

206. When the investigation asked the Executive Director why there was pressure on the Working Group to draft the TBM Regulations in a very short time, he said it was 'the need to move on with this particular major project'. He further explained:

the backdrop to all of this is ... the joint venture would not start the tunnel boring machines until they had 100 per cent legally robust ample space with multiple contingencies to take the soil, if it had any level of contamination. So, the pressure generally was to get the tunnel boring machine started and get on with the project.

207. MEG, in its submission to the investigation, noted it was in communication with the EPA at this time:

Importantly, during the exchanges in May to June 2020, the EPA did not inform MEG that it was developing the *Environment Protection (Management of Tunnel Boring Machine Spoil) Regulations 2020* or the implications these regulations would have for its decision-making process or MEG's review rights.

208. MEG disagreed that the TBM Regulations would not impact the community. They noted 'lowering human health and environmental protection standards' and removing their right to a VCAT review were significant impacts.

Pressure on the EPA to ‘fix’ the issues

209. The EPA Executive Director described the extent to which the EPA was being asked to ‘fix’ the contractual issues between the John Holland Consortium and the Government to ensure tunnelling could begin.

210. When asked why it fell to the EPA to ‘fix’ these issues, he said:

it frankly really annoys me that it does fall to [the EPA], and I think it's outrageous that we can get to a point where a proponent, for the first time in Victorian history at least, says, 'I want three sites with full environmental and planning approvals', on the basis they might pick one of those sites or none of those sites. I thought it was an outrageous situation driven by the contractual arrangement, rather than an environmental arrangement.

“I thought it was an outrageous situation driven by the contractual arrangement, rather than an environmental arrangement.”

– Former Executive Director, EPA

211. The Executive Director said the EPA does not direct applicants to pursue a particular approvals process, rather its role is ‘reactive’ and limited to considering the applications that are put forward. However, in this project:

I've never, in my career, seen such ... a series of barriers put up by a proponent. It's just been extraordinary. And that culminating with a three-way tender process with full environmental and planning approvals is just extraordinary.

212. He further explained that while the expectations of the John Holland Consortium were ‘extraordinary’, the EPA was always subject to some form of pressure from external parties:

I've worked in decision making for a long time ... and there is always pressure for the EPA to hurry up or to just fix it or make it go away, whether that's from the Minister's Office or whether that's from proponents, or whether that's from community groups or, or whatever it might be.

“There is always pressure for the EPA to hurry up or just fix it or make it go away, whether that's from the Minister's Office or whether that's from proponents, or ... community groups.”

– Former Executive Director, EPA

213. However, he said this didn't mean the EPA was asked to act in a way that was inconsistent with its role as an independent regulator:

at no point have I been asked to do something at the Minister's behest ... they always respect the independent role. It doesn't mean the pressure doesn't exist.

214. The CEO said:

I don't accept claims that we compromised the substance of the decision because of the significance of the project. In fact, our role was to make sure, of the science of PFAS, the protection of environment, human health through the decision, that that was fully taken into account through the process.

215. When asked whether she would have navigated things differently in hindsight, the CEO said:

You can't predict what's going to come at you as a regulator. In an ideal world, you'd be able to predict what's coming, and everything would fit in a box, and so on. But it's just not like that as a regulator.

Community awareness of the spoil disposal plans

“The community believes that the EPA has acted on behalf of the government and major corporations and [is] not upholding its core responsibility of protecting human health [and] if they were to have actively engaged with the community, they would have seen the community concern around the project.”

– Sunbury Says No community group

216. While the Working Group was developing options in early 2020, several community groups and agencies became aware the spoil might be sent to their local areas.
217. The investigation sought submissions from the following groups that had publicly expressed discontent at the EPA's decisions and lack of consultation:
- Bacchus Marsh Grammar ('BMG'), a school near the MBC site
 - Moorabool Environment Group ('MEG'), an established environmental group
 - Bacchus Marsh Community Coalition ('BMCC'), a community advocacy group which has held a public meeting and several protests about the EPA's decisions and has around 3,100 Facebook members
 - Sunbury Against Toxic Soil ('Sunbury Says No'), a community advocacy group with online membership of over 4,800 people, representing concerned Sunbury and Bulla residents
 - Hume City Council.
218. Community groups BMCC and Sunbury Says No both formed in 2020 in response to the proposals for MBC and Hi-Quality sites to receive WGTP spoil.

219. Both groups were involved in community advocacy projects and initiatives such as online and in-person protests, lodging webform submissions and complaints with the EPA, and holding public meetings.
220. Long-standing environmental group MEG told the investigation it had been monitoring Maddingley Brown Coal's activities since 1999, and had an established relationship with the EPA.
221. Several groups told the investigation they found out about the proposal for sites to receive the WGTP spoil from media reports. This was despite some having pre-existing communication channels with the EPA.
222. MEG stated by the time the EPA told it about the proposal for the MBC site to receive spoil during a call on 13 April 2020, the group had already heard. BMG said it became aware of the proposal in February 2020 and approached the EPA.
223. BMG met with the EPA on 12 March 2020, and both MEG and BMCC met with the EPA on 24 April 2020.
224. Both the Executive Director and the CEO told the investigation it was primarily the John Holland Consortium's responsibility to consult with the community. The Executive Director stated, 'you don't want to ... create the situation where it's [the] EPA's proposal and it's [the] EPA's waste'.

“You don't want to ... create the situation where it's [the] EPA's proposal and it's [the] EPA's waste”

– Former Executive Director, EPA

Figure 6: Banner protesting the disposal of spoil in Sunbury and Bulla



Source: Victorian Ombudsman

225. The CEO described the EPA's role:

In terms of the broader PFAS context ... some of the things I do is ensuring the Chief Environmental Scientist role is there, ensuring that there's priority given to exploring that science, and communicating that broad science.

...

PFAS was one of those lightning rod type issues. So, the broader intent behind making the Chief Environmental Scientist available was ... to try and get the independent information and facts out there ... to help inform people in a highly emotive context.

226. The Executive Director said community feeling about PFAS was well understood by the EPA at the time:

There is simply the perception of toxic [soil] which has been reinforced through social media, through the media ... simply that perception means that, as was clearly stated to me ... 'We don't care what's in it. We don't want it.' Because of the perception of the toxic tunnel. EPA just doesn't have the media and influencing resources to turn that around.

“PFAS was one of those lightning rod type issues ... [There was need] to try and get the independent information and facts out there ... to help inform people in a highly emotive context”

– Former Chief Executive Officer, EPA

227. News reports also reflected a perception in the community that Melbourne's west was being unfairly used as the 'dumping ground' for waste. In a May 2021 article published by local news outlet *Star Weekly*, Brimbank City Council Mayor Ranka Rasic said the Council was 'extremely disappointed' with the proposal:

Melbourne's west, particularly Brimbank, has long borne the brunt of absorbing the state's waste, contamination, pollution, landfill and traffic needs. This wouldn't happen in the east, so why is it okay for the west to be treated differently?

228. Significant concerns began developing in the affected communities in early 2020. The chief concern was the impact of PFAS on human health, and its unknown long-term effects. Other concerns included the impacts on the local environment, quality of life, road infrastructure as well as nearby properties.

229. Following their initial meetings with the EPA, most of the groups attempted further contact via phone and email throughout 2020 to seek further information and raise concerns.

230. Sunbury Says No said it had hoped to 'be a part of the process' and be involved in the decision making, with an opportunity to submit information and opposition to the proposal.

231. The other groups similarly wanted an opportunity to air concerns and gain reassurance from the EPA that the proposal would not pose any risk to health or the environment.

232. Despite being aware of the considerable interest of community groups, the EPA and Working Group had no meaningful interaction with these while it drafted the TBM Regulations and made decisions about the EMPs.

The drafting of the TBM Regulations

233. The EPA made various public statements to the effect that it was not involved in the discussions about, or development of, the TBM Regulations.

234. On 3AW radio on 2 September 2020, the Executive Director said the EPA had not created the TBM Regulations and that they had been created by 'other parts of Government'.

235. When asked why the TBM Regulations removed the right to appeal to VCAT, the Executive Director said:

That's not a matter for us ... that's a matter for the design of the regulations themselves, we don't write our own regulations, occasionally we might like to, but we don't.

236. However, documents reviewed by the investigation showed the EPA was intimately involved in the development of the TBM Regulations as part of the Working Group.

237. The EPA met with MTIA and WGTP representatives regularly before the Working Group began drafting the TBM Regulations to discuss potential disposal sites.

238. An email from the WGTP's Planning & Property team to the Department's legal team on 14 May 2020 said 'we have been working with [the EPA Executive Director] and his team on the EPA pathways for reuse for over the past 8/9 months'.

239. An officer from the Department's legal team forwarded this email to colleagues on 14 May 2020 querying 'whether it is appropriate for EPA to continue meeting' with the WGTP. Their concerns appeared to be that these meetings could create a perception that the TBM Regulations were 'made for the purpose of facilitating the WGT and not the objectives of the ... [Environment Protection] Act'.
240. They also suggested the Department should 'ring fence any discussions that have taken place to date between [the Department]/EPA and MTIA/Department of Transport and carefully managing any that occur going forward'.
241. Despite this, emails show the MTIA continued to provide detailed feedback and suggestions to the Department and the EPA on the content of the TBM Regulations as they were being developed. A draft of the Regulations as well as detailed information about the Ministerial RIS exemption certificate was shared on 26 May 2020 with the WGTP's CEO and a Department of Premier and Cabinet executive director.
242. The Department's legal team held concerns about the 26 May 2020 email, with an internal email saying:
- While it may be appropriate to consult with MTIA to seek their feedback on Regs for EPA consideration, this should be the sole purpose of engagement with MTIA and should be done openly and transparently for all stakeholders.
- We appreciate wanting to be helpful, however, an appearance that [the Department] and MTIA are working closely together would tend to compromise an assertion that decision making on the Regs has been independent and for a proper purpose, which would carry significant risk. The comments about the certificate for RIS exemption is particularly high risk in this regard.
243. In his interview with the investigation, the EPA Executive Director said he didn't share the concerns expressed in the email by the Department's legal team.
244. The Executive Director said he didn't know how involved the WGTP were in the development of the regulations, but had 'no doubt they were involved because they were a government agency with a critical interest in this new law that was going before the Parliament'.
245. The involvement of the WGTP lawyers could have created the impression to an outside person that the Department and the EPA were being influenced by the WGTP when drafting the regulations to ensure the three identified sites would be approved.
246. The Executive Director also said:
- In terms of my history of meeting with West Gate Tunnel with Transurban and the [Consortium] that ceased immediately when we were told of the prospect of three applications coming forward for TBM facilities. That's when we thought, 'Well, in respect of the actual applicants who are not at the table, we shouldn't be speaking with the joint venture or Transurban at all about that'.
247. However, the investigation notes the three landfill operators had tendered to the John Holland Consortium in February 2020. Emails show the Working Group had these three landfill operators in mind throughout the drafting process.
248. The WGTP also remained closely involved in discussions about how the TBM Regulations would affect the tendering sites.

249. In an email dated 28 May 2020 from the Department's Planning Services team to a Department executive director, they wrote:

[The] WGTP is doing a line by line review [of the Regulations] including their legal people.

There are a few problems including needing a setback of 100m from residential land that will mean the regulations kill the Hi Quality site ... If they cannot comply with the new regulations, they would need a full works approval that defeats the regulation introduction.

WGTP will be putting their comments to the EPA.

250. This email refers to the technical and environmental requirements of section 6(2) of the TBM Regulations, specifically the need for a buffer zone between the sites and sensitive-use areas. The email describes these requirements being changed to suit the Hi-Quality site.

251. Other emails show the EPA taking an active role in providing the Working Group with site-specific information and advice about the landfill operators who were likely to apply for approval under the TBM Regulations.

252. The TBM Regulations say the operator of the site must ensure:

the boundary of the processing area is at least 200 metres from any building that is a sensitive land use, including a residential dwelling, a health service, a childcare centre or an education centre.

253. A 12 June 2020 email between directors at the Department discussed changing the buffer zone from 100 meters (the distance originally proposed to be included in the TBM Regulations) to 200 meters. One director wrote:

EPA are confirming whether the increase in buffer will affect likely processing sites - there is a high potential that the increase to 200m could make Hi-Quality application non-viable.

254. The EPA Executive Director responded in an email on 12 June 2020:

Approximate distances are:

Hi Quality - 285m (Farm)

MBC - 355m (School)

Cleanaway - 1.5km (Prison)

We could safely change the distance to 200m subject to administrative limitations.

255. In a 30 June 2020 email, the Department's Acting Deputy Secretary explained to Planning Services:

We did play with the language around the buffer as Minister was keen that it was no less than usual - hence 100m was increased to 200m. But we added the word 'building', so that the measurement is taken from the building structure itself, rather than any attachments, such as a driveway. EPA cross checked this against maps around [Hi-Quality] and MBC and assessed this as ok.

256. The fact that site specific information was considered ahead of making this change furthers the perception that the TBM Regulations were tailored to ensure the applications made by particular commercial entities would be approved.

257. Asked by the investigation whether elements of the TBM Regulations were drafted with specific projects and sites in mind, the Executive Director acknowledged:

Well, I guess, there were, at the stage of the making of the regs, three sites in contention at that stage. And obviously, somebody has done an analysis of ... distance of different structures and so forth, and then, obviously, we've been asked some questions around what it means from an environment protection point of view.

258. On the topic of using information from the WGTP to inform drafting the TBM Regulations, the Department said the following:

It is appropriate and useful to use existing and real situations to inform new regulations. In this case, while the regulations were driven by the needs and impacts of the specific activity (tunnel boring spoil), being carried out by the [WGTP], the intent is that they will be suitable to apply to future, and similar activities which result in similar impacts (that is, the generation of tunnel boring spoil). The department understands future, similar activities are entirely likely.

259. The Executive Director said that while the TBM Regulations were 'bespoke', the involvement of the WGTP did not compromise his assessment of the EMP applications:

being experienced in this role, I get a lot of pressure from a lot of interested parties on a lot of approvals and this was no exception.

260. In its response to a draft version of this report, the Department disagreed that the TBM Regulations were bespoke, emphasising the potential for them to be used for future tunnelling projects.

261. Similarly, in response to the report, the EPA said the TBM Regulations, while being 'activity specific', were not 'project specific'.

262. The investigation acknowledges the broader context in planning for future infrastructure projects but notes that the 2017 Act provides additional mechanisms to assess such projects, suggesting less ongoing need for the TBM Regulations.

263. When asked whether the TBM Regulations provided equivalent environmental protections to the processes ordinarily used under the 1970 Act, the Executive Director said:

The short answer is yes. What we found is that they are far more prescriptive, which I guess gives a level of community confidence, but it also trips up regulators, as we've found out.

264. The CEO took a similar view, stating:

There are many who would argue that we, as the regulator, completely over engineered a solution proportionate to risk.

265. After the draft TBM Regulations were finalised by the Working Group, the Minister was briefed on 3 June 2020 and the CEO signed a recommendation that the TBM Regulations be made on 16 June 2020. The TBM Regulations came into effect on 30 June 2020.

Conclusions about the EPA's role in developing the TBM Regulations

266. On the evidence reviewed, the EPA was pressured to find a solution to assist the Government in responding to potential legal challenges from Transurban and the John Holland Consortium. This was done to avoid the practical problems and political fallout of disposing the spoil in municipal landfills.
267. Despite public statements to the contrary, the EPA was closely involved in the drafting of the TBM Regulations. Documents show the EPA provided information and advice to the WGTP and the Department about the specific landfill operators tendering for the work. It is unclear to the investigation why the EPA tried to downplay its involvement in developing the TBM Regulations.
268. The TBM Regulations were at least partly developed to meet the needs of this specific project. They were drafted in a way that ensured the John Holland Consortium had what the Executive Director described as '100 per cent certainty' around its environmental approvals, so that once the TBMs started, they could excavate uninterrupted.
269. Creating the TBM Regulations was an expensive, resource-heavy exercise, especially given the works approval and licence process already existed.
270. The deliberate exclusion of community consultation and third-party review in the TBM Regulations meant potentially affected communities were not meaningfully consulted, despite the EPA being aware of their concern. This also appears to have created a widening gap between what the EPA perceives its role to be when making decisions of this nature and how the community expects an environmental regulator to behave.

The EPA's approval of the EMPs

“ Unfortunately, the underhanded and secretive operations of the EPA have so fundamentally undermined our and our community's trust in the authority ... ”

– Moorabool Environment Group

271. The TBM Regulations created a much different landscape for the three landfill operators compared to the one in place when they first tendered to receive WGTP spoil in February 2020. The new regulations allowed them to apply for permission from the EPA without going through a works approval and licensing process.
272. Soon after the TBM Regulations took effect on 30 June 2020, the three operators submitted their EMPs to the EPA for approval.
273. These EMPs needed to include documentation that satisfied all twenty matters described in regulation 6(2) of the TBM Regulations, listed in Figure 2 of this report.
274. The EPA was also required to assess whether the EMP adequately protected human health and the environment, as required by regulation 6(3).
276. Hi-Quality submitted at least three draft EMPs for a Bulla site, receiving feedback from the EPA on each one. In a letter dated 1 September 2020, the Executive Director approved Hi-Quality's EMP 'subject to the provision of the additional information'.
277. Cleanaway prepared an EMP for a Ravenhall site. It was approved by the EPA on 12 October 2020.
278. The EPA told the investigation each landfill operator's EMP proposed containment facilities that were suitable for PFAS levels 'far in excess of' those identified in groundwater samples along the project alignment.
279. The Executive Director said:

the figure that we landed with each of the [operators] was seven micrograms so ten times higher than the highest ground water reading that we had ... all three aimed for seven micrograms. And importantly, that was our approach from then on is to hold them to account for building facilities that will protect for ever and ever seven micrograms.

Information and documentation provided in the EMPs

275. MBC submitted four versions of its EMP for approval between July and August 2020 for a Bacchus Marsh site, and received feedback from the EPA on each one. Version 5.1, submitted on 17 August 2020, was approved by the Executive Director on 1 September 2020.
280. The EPA maintains each of the EMPs was 'rigorously assessed' and that it liaised with the landfill operators and their auditors in relation to any further information that was required.
281. However, the investigation reviewed the operators' EMPs and the EPA's 2020 approval letters. The EPA noted in the approval letters there was significant information missing from all three EMPs.

282. Information missing from MBC's included:

- detailed designs of the liner of the containment cell
- auditor-reviewed detailed designs, technical specifications and a construction quality assurance plan for the construction of holding bays and leachate management infrastructure
- verification by an environmental auditor, third-party geotechnical verification, details of leachate management controls, and integrity-monitoring plans for the cell liner
- follow-up noise assessment
- a detailed rehabilitation and after-care management plan including detailed designs for the containment cell cap, an auditor review, plans for ongoing leachate management and monitoring, and cap erosion inspection and remediation.

283. Hi-Quality's was similarly incomplete. It did not include an auditor's review of detailed designs, verification of the containment cell by a construction auditor, detailed designs for the wastewater treatment plant, or an incident response plan.

284. Cleanaway's lacked modelling to justify its choice of material to prevent seepage, sampling at off-site waterways and some of the approvals required to legally discharge treated water.

285. The EPA recommended extra management measures for all three sites. These ranged from restricting access of birdlife to the on-site leachate ponds for MBC, to conducting soil sampling before and after the use of holding bay areas in the case of Hi-Quality.

286. The EPA told the investigation it 'considered it had obtained sufficient information required under the TBM Regulations to rigorously assess each proposal and be satisfied that the EMPs properly protected human health and the environment'.

287. However, emails between EPA officers at the time the decisions were being made show they were aware the information provided was not sufficient to satisfy TBM Regulation requirements.

288. In an email dated 31 August 2020, a member of the EPA's legal team wrote to fellow EPA officers:

I've completed my review of the assessment report and the cover letter for Hi Quality.

I think the cover letter has been well crafted to not draw too much attention to further information that is to be provided - which, under the circumstances, is well done.

As we have concluded, it's just not possible for an EMP applicant to provide the kind of detail that would obviate the need for the submission of any further designs and plans post-approval. In which case, we are wearing a little bit of risk here.

289. In another email the same day, they wrote:

I've been over the MBC assessment report now as well. I think the problems are - at this stage - a bit too late to be rectified. I have made some comments on the table at the end though. If we are going to publish this, can we just make it clear that we are satisfied we received the information, even if we are asking for more? In some sections, it's just not clear what we're saying. That is, whether we have received the information or not.

290. The investigation notes that while the approval letters identified deficiencies in the EMPs, they did not specify when the landfill operators were required to provide outstanding information or take additional measures required to comply with the TBM regulations.

291. The approval letters also did not make it clear whether the EPA intended the approval to be legally binding from the time it was granted or after the outstanding information was provided.

292. Asked if landfill operators gave enough information in the EMPs, the Executive Director acknowledged the EPA did not insist on seeing the full detail of some matters 'that were not material to the integrity of the proposal' such as the exact design of the landfill caps.

293. For example, in response to questions about the absence of detailed designs for leachate management in the MBC proposal, he said:

Look, the requirement was there to treat water to drinking-water levels. How exactly that's achieved in terms of whether a plant is available to them at short notice or whether some other sort of treatment plant is available to them. Again, it doesn't matter. What matters is the outcome.

294. The Executive Director did not see a problem with landfill operators providing this sort of information later. His view was approval would not take effect until the extra paperwork was received, and in the meantime the landfill operators could start preparatory works.

295. However, this view appears to be inconsistent with legal advice dated 30 July 2020 sought by the EPA on an early draft of MBC's EMP:

If the decision maker forms the view that conditions will likely be met by the provision of further information (such as a schedule of works for example), the better approach would be to require that further information prior to any approval.

296. It is worth noting both BMCC and MEG alleged that MBC had previously failed to manage leachate from an existing landfill as required by their licence. The community groups expressed concern that expanding MBC's activities would risk groundwater quality below the MBC site and risk contaminating Parwan Creek with leachate.

297. MEG said it was the only group which monitored threatened species in the Bacchus Marsh area. It said should MBC receive contaminated WGTP spoil, this monitoring program would need to increase considerably.

298. MEG stated the MBC site's proximity to waterways and aquifers increased the risk of leachate contaminating sources of irrigation for agriculture, as well as affecting local wildlife:

It is important to understand in this regard the location of the site of MBC. Key points are that the MBC site is situated on a hill, with a downward slope toward Parwan Creek, which runs through and along the site. The creek then flows into the Werribee River, the primary source of irrigation for the market gardens from Bacchus Marsh through to Werribee South. Significant aquifers sit close to the surface under the site. These aquifers feed water bores used for food crops and livestock, and also interact with local creeks and rivers.

299. An email from an EPA lawyer suggests the EMP approval decisions were subject to time pressure. The lawyer's reference to problems with MBC's EMP being 'too late to be rectified' indicates the EPA accepted the missing information could not be provided at that time. It is not clear why the EPA could not wait for the missing information to be provided by the landfill operators if time was not an issue.

"Every proponent wants a decision yesterday, that's pretty normal for a regulator"

– Former Chief Executive Officer, EPA

300. When asked whether time pressures were a factor in the way he approached these decisions, the Executive Director said: 'no, that is not the case'. When questioned, his response to the EPA lawyer's email was it was 'just an unfortunate turn of phrase'.

301. The CEO commented, 'Look, every proponent wants a decision yesterday, that's pretty normal for a regulator that proponents want things yesterday' and therefore said she 'couldn't speculate' as to what influenced the decision to grant the conditional approvals.

Conditional approval of the EMPs

302. The TBM Regulations state the EPA:

may only approve an environment management plan if it is satisfied that the plan, together with these Regulations, adequately protects human health and the environment from the harmful effects of pollution and waste.

303. There is no express provision in the TBM Regulations for the EPA to conditionally approve an EMP.

304. Legal advice provided to the EPA on 7 May 2020, when the TBM Regulations were being drafted, specifically contemplated allowing the EPA to impose conditions as part of its EMP approvals – and advised against it.

305. The advice said allowing the EPA to do this would risk the TBM Regulations being invalid. The EPA only had the power to administer the regulations, not to put conditions of them. The EPA acknowledged and agreed with this advice.

306. Subsequent legal advice indicated the EPA could conditionally approve an EMP, where any outstanding information was not key to satisfying the mandatory requirements of the TBM Regulations.

307. On 1 September 2020, the EPA approved the EMPs for MBC and Hi-Quality 'subject to' further information being provided.

308. Asked why he thought it was open to him to conditionally approve the EMPs in 2020, the Executive Director told the investigation:

all other landfill approvals have the same sorts of conditions attached to them. So, for me it was a perfectly normal scenario to have what is essentially a landfill, in this case a very low-risk landfill, with some conditions attached. That's, I guess, my error in terms of relying on a process that we're used to and applying it under a brand-new set of laws with slightly more prescriptive requirements.

309. He explained he decided to conditionally approve the EMPs based on his understanding of the TBM Regulations, and now acknowledges that it ended up being an incorrect decision:

look, in, in terms of, reflecting on the decision, the key thing for me would have been, with the benefit of hindsight ... [to get] further legal advice on the instrument that we were issuing ... [we] should have done that. But we'd already spent hundreds of thousands of dollars on external legal advice on this matter and ... we operate in a resource constrained environment, so I made a judgement.

310. On 21 August 2020, an EPA Director emailed the EMP Assessment Reports and draft approval letters to the CEO to approve and sign. The email advised 'it is worth noting that a decision under the TBM Regulations isn't delegated so we will be seeking your signature on the approval letters when they are completed'.
311. In response on 24 August 2020, the CEO wrote: 'Is it possible to organise delegation to the ED [Regulatory Standards, Assessments & Permissioning] in the next couple of days, consistent with our other regulatory decisions'.
312. The power to approve the EMPs was delegated to the Executive Director, who signed the approval letters issued to the landfill operators.
313. When asked why she didn't make the 2020 EMP decisions, the CEO said:
- given all the other things I was dealing with as a CEO, that I was not confident at the time that meant that I could give it the dedicated attention it needed as the delegated decision maker.
- ## Environmental principles and human rights in the EMP decisions
- ### Views of the EPA
314. When making a decision under the TBM Regulations and the 1970 Act, the EPA was required to uphold the principles of environment protection.
315. The EPA told the investigation the principles were inherently part of its process, explaining they were considered:
- ... through the process of extensive interrogation of the scientific and engineering aspects of any proposal ... consideration of the principles of environment protection is an exercise that cannot be separated or isolated from consideration of the detailed technical aspects and overall acceptability of any proposal.
316. The EPA's Assessment Reports for the 2020 and 2021 EMPs did not articulate how the authority considered the environmental principles in its approval decisions.
317. The EPA submitted that although the application of the principles wasn't specifically articulated in the EMP Assessment Reports, the reports constituted a 'comprehensive review of the EMP proposals and set out the basis upon which the decision to approve the plans was made in each case'. The EPA explained the relevant principles were acknowledged as being part of the 'overarching framework for the decision-making process'.
318. The EPA submitted it considered the environmental principles when making the EMP approvals in the following ways:
- The 'principle of integration of economic, social and environmental considerations (also known as the 'triple bottom line' principle) is always front of mind when assessing any proposal for a relevant EPA approval'.
 - The precautionary principle and the principle of intergenerational equity 'were covered' by 'interrogation of the detailed technical specifications' in the proposals, which the EPA said 'clearly showed the designs to be highly precautionary and unable to adversely impact future generations'.
 - The principle of wastes hierarchy was considered when assessing containment measures required at the landfill sites. The EPA said it 'requested' the landfill operators 'demonstrate what their reuse opportunities were as part of their application to receive and manage the waste soil'.

- The principle of integrated environmental management was also engaged with in the process of undertaking assessment reports, as the reports set out, for example, the risks of contaminated water being released from the wet soil and identified solutions to managing leachate risks.
- The principle of accountability was satisfied by publishing the EMP Assessment Reports on the EPA's website once decisions were made.

319. As with consideration of the principles of environment protection, the EPA advised that consideration of human rights was built into its processes.

320. There is no reference to the EPA considering the Charter of Rights Act in any of the EMP Assessment Reports from 2020 or 2021. Asked by the investigation to describe specifically how the EPA acted compatibly with, and gave proper consideration to human rights when making the EMP decisions, the EPA submitted:

Ultimately, given the low risk of the TBM Spoil ... and the robust design and interrogation of same ... it was determined that any risk to human health was eliminated. In the absence of any conceivable harm to humans, it was determined that there was no potential human rights breach.

321. This is consistent with the view of the Executive Director, who said he had only considered human rights in a 'cursory way', but thought the low 'risk profile' of the project meant it could not 'offend' human rights:

Even if all of the groundwater coming out of that site ... was at the 0.7 figure ... You can swim in it safely. So I ... couldn't reconcile offending human rights if you're not offending human risk in any way.

322. When asked whether the EPA had a process where the Charter of Rights Act was considered, the Executive Director stated:

I don't think the EPA has ... anything in place to alert people to the Human Rights Charter ... Obviously, there's a general level of staff awareness about it and staff are surveyed about it ... But there's no systemic discharge of the Charter of Human Rights in decision making that I'm aware of.

323. The CEO told the investigation the EPA took human rights very seriously from a 'broader cultural point of view' and that human rights were 'part of what we looked at' in making environmental decisions. However, in the context of the EMP decision making, she could not comment, as the decisions were made by her delegate and she did not know how it 'played out'.

Views of community groups

324. While human rights were not front of mind for the EPA in its decision making, they were very much a focus for affected communities.

325. BMG suggested the right to protection of children, contained in section 17 of the Charter of Rights Act, was not considered by the EPA. The school stated it was 'difficult to see' how the EPA considered the best interests of students when making its decision.

326. Community groups also raised the specific principles of the 1970 Act, with BMG and MEG stating that in choosing not to consult meaningfully with the community, the EPA had failed to uphold the principles. MEG stated it considered the conduct of the EPA was 'directly in conflict' with the principle of accountability:

The EPA determined that it had no legal obligation and therefore did not consult at all. It had no regard to the applicable principles in the Environment Protection Act.

327. BMG said it appeared the EPA prioritised economic considerations above all else, did not undertake careful evaluation of the proposal and 'failed time and time again' to provide relevant information or an opportunity for BMG to be part of the decision process. BMG said the EPA did not adequately consider its principles of:

328. Other community groups, while not expressly referring to human rights or the principles in the 1970 Act, provided detailed submissions on the perceived impacts of the EMP decisions on their health and quality of life. The concerns related to several human rights, including the right to life, to participation in cultural practices and property rights.

330. Residents emphasised they chose to live in the Sunbury, Bulla and Bacchus Marsh areas for the semi-rural lifestyle, which they believed was in jeopardy. A letter submitted to the investigation by Sunbury Says No explained:

the EPA's approval of the EMPs

331. Several groups noted that as a result of the EPA approving the EMPs, some residents had decided to move from the area, a decision which had financial consequences for those families given the costs of relocation.

“We moved to Sunbury to give our children clean, safe open spaces to grow up in ... I refuse to allow my family to be guinea pigs while we wait to see what the long-term effects of these chemicals are.”

– Sunbury Says No community group

Legal challenge by community groups

332. MEG, BMG and BMCC first heard the EPA had approved EMPs via a call from the Executive Director on 1 September 2020. The EPA sent the groups an email the next day with links to the EMP Assessment Report and approval letters on the EPA website.

333. MEG said it had repeatedly tried to engage with the EPA about the matter before the decisions were made. The group stated that ‘while the EPA initially appeared responsive, from about June 2020 the EPA effectively refused any meaningful consultation with MEG’. It said the EPA declined to provide information, did not respond to requests for a further meeting, and refused to deal with a Freedom of Information request for documents about the TBM regulations because it was too onerous.

334. BMG said its efforts to engage with the EPA met a similar response and the school was ‘forced’ instead to issue legal proceedings in the Supreme Court of Victoria. The school wrote:

once the Decision had been made, BMG considers that the communication of the Decision to the wider community was grossly insufficient. BMG acknowledges and appreciates that the EPA provided “courtesy calls” to forewarn of the pending media release to the wider community of its Decision.

However, the approval documentation published to the EPA website, including MBC’s EMP and the EPA’s Assessment Report, was so heavily redacted that it was near impossible for third parties to form a view as to whether the EPA had made a well informed and correct decision.

335. BMCC said the information released by the EPA echoed the community consultation experience, in that there was ‘no transparency’ and residents were ‘left in the dark’.

336. When BMG and MEG started legal proceedings to challenge the EPA’s decision to approve MBC’s proposal, they went to the Supreme Court because VCAT review rights were not available under the TBM Regulations.

337. On 29 October 2020, BMG challenged the legality of the EPA’s decision on the grounds that the EMP did not include all of the requirements under the TBM Regulations, and that the EPA did not have the power to grant conditional approvals.

338. BMG's Principal raised concerns about:

- the presence of PFAS and its impact on human health, particularly young children
- the increase in truck traffic on the roads and its impact on the health and safety of school children
- the withdrawal of students from the school if MBC is the recipient of WGTP spoil.

339. On 2 November 2020, MEG challenged the legality of the EPA's decision on eight grounds, including:

- MEG was not provided with procedural fairness during the EMP approval process
- the EPA could not have been satisfied that the EMP adequately protected human health and the environment, as is required by regulations (1)(a) and 6(3) of the TBM Regulations, because information required by regulation 6(2) of the TBM Regulations was unclear, ambiguous and missing
- the EPA failed to consider the proximity of a threatened species, the Growling Grass Frog, and the impact on that species of MBC's proposed activities.

340. BMG told the investigation getting legal advice to challenge the EPA's decisions was expensive, stating it cost 'upwards of \$300,000'. MEG also emphasised the burden of legal proceedings, estimating the overall commitment at more than 1,000 hours. While it had access to pro bono barristers and solicitors, it used crowdfunding through a 'Go Fund Me' page to cover other costs.

341. Hume City Council, Melton City Council and Moorabool Shire Council were not involved in legal action against the EPA at this time. However, all three councils later challenged the Minister for Planning's decisions to amend their respective planning schemes, for the use and development of the three sites as spoil processing facilities, partly on the grounds the Minister relied on the EPA's unlawful approval decisions. These proceedings were all dismissed although the Melton City Council decision is under appeal.

Revoking the decisions

342. In response to legal challenges by the community groups, the EPA sought legal advice on the adequacy of MBC's EMP and whether the EPA had the power to approve EMPs subject to conditions.

343. The advice said the EPA did not have enough documentation to approve the EMP, and in particular lacked detailed designs and an environmental auditor report. The advice stated:

... the Supreme Court is highly likely to conclude that the Decision (to approve the plan) is invalid and of no force and effect.

344. The advice further stated the EPA did not have the power to grant a conditional approval and that if it wanted to do so it should consider amending the TBM Regulations.

345. The advice recommended the EPA explore ways to settle the proceedings initiated by the community groups:

In our view, it would be highly desirable for the Court to quash the Decision with the consent of all parties ... which would then enable: (a) MBC to submit a fresh plan; (b) the EPA to make a fresh decision in a manner that, to the greatest extent possible, addresses the grounds advanced in these proceedings.

346. At interview on 9 December 2021, the CEO was asked whether the EPA was aware that it didn't have the required information to approve the EMPs. She said:

This is a unique challenge to new regulations. I agree we make ... approval decisions, regulatory decisions all the time. The unique thing about new regulations is that ... they're untested through the courts, and it's inevitable that there'll be tests.

347. However, she acknowledged the 'ultimate decision wasn't the best that could have been in place', and said, 'as soon as it came to my attention that there had been an error, as a model litigant, my role was to make sure we took action on that'.

348. Once it received advice that its decisions were likely to be invalid, the EPA took several actions:

- It requested, on 7 December 2020, the Court defer the hearing until 10 February 2021 in order to give the parties time to attempt to settle.
- It wrote to MEG and BMG on 7 December 2020 stating it consented to quashing its decision to conditionally approve MBC's EMP.
- It informed Cleanaway and Hi-Quality in a letter dated 10 December 2020 that the EPA's decision to approve their EMPs was 'affected by jurisdictional error' and was 'invalid' with 'no legal force or effect'.
- It advised MBC in a letter dated 14 December 2020 that it had written to the other landfill operators advising them that the EPA had formed the view that its decision to approve their EMPs was affected by the same jurisdictional error.

- It advised all three landfill operators that if they wanted to have an EMP approved under the TBM Regulations, they would need to submit a fresh EMP to the EPA that included all the material required by the TBM Regulations.

349. On 10 and 16 February 2021, the Supreme Court issued orders quashing the decision regarding MBC's EMP and ordering the EPA to pay costs for both MEG and BMG.

Approval of new EMPs

350. The EPA appointed a new decision maker for the 2021 EMP decisions. In his interview with the investigation, the Executive Director said this was because the EPA wanted 'to remove all possible risk from these decisions', especially the perception of bias.

351. Legal advice dated 1 December 2020 highlighted the following:

- The EPA's assessment of the EMPs needed to expressly address criteria in regulations 6(2) and 6(3) in further detail.
- There needed to be a clear statement from the EPA that the EMPs and TBM Regulations adequately protected human health and the environment from the harmful effects of pollution and waste, including reasons.
- The assessment needed to address matters raised by the community groups in their grounds for review. For example, considering the impact on Growling Grass Frogs as raised by MEG.

352. The EPA told the investigation it applied 'an additional level of scrutiny' and attention to the requirements of the TBM Regulations when making the 2021 EMP decisions. This scrutiny, according to the EPA, included obtaining external technical and legal advice.

353. The EPA's 2021 EMP Assessment Reports included an express statement that the EPA was satisfied the EMPs adequately protect human health and the environment as required by regulation 6(3). The statement, included in each EMP Assessment Report, said:

[The] EPA has reached this state of satisfaction having regard to conclusions ... set out in this summary (see below), as well as the other conclusions addressed throughout the assessment report.

In particular, EPA has considered:

- assessment of the spoil ...
- the holding bays ...
- the containment cell ...
- the leachate pond and leachate management ...
- the human health and ecological risk assessment ...
- the environmental management.

354. The EPA's Assessment Report for Hi-Quality's EMP, approved on 5 March 2021, appeared to address the information outstanding from the previous EMP. In it, the EPA stated it was satisfied an environmental auditor had assessed the containment cell and cap design documents provided, and the EMP contained sufficient provisions to manage environmental risks that may arise during containment-cell construction and operation. The Assessment Report also stated detailed information about the wastewater treatment plant had been provided, and the proposed design was acceptable. It also notes incident reporting was addressed in the EMP.

355. The EPA's Assessment Report for MBC's EMP, approved on 13 April 2021, also appeared to have addressed information not included in the earlier application, including the designs of the liner and cap of the containment cell, technical specifications and a construction quality assurance plan for the holding bays and leachate management infrastructure. The EPA was satisfied with the noise risk assessment provided and confirmed an environmental auditor had assessed the EMP.

356. The EPA's Assessment Report for Cleanaway's EMP, approved by the EPA on 14 May 2021 also appeared to address information not included with the earlier application, stating the modelling appeared to support the liner profiles chosen to prevent seepage, and sampling would be undertaken at offsite waterways. The Assessment Report stated there was a commitment to continue the sampling if PFAS increased or there was an event that could potentially impact surface water. The Assessment Report also stated the EMP addressed the reuse or disposal of treated water.

357. The EPA's Assessment Reports for all three EMPs confirmed that an environmental auditor assessed each EMP.

Concerns about inadequate consultation

358. The inclusion of further detail in the 2021 EMPs Assessment Reports did not satisfy the community groups who were only able to view redacted copies of the EMP approvals.

359. Sunbury Says No's submission noted:

The EPA has supplied no information to the community except what has been posted on their website. We have requested copies of EMP submissions [and] soil testing results to be provided however the only documents the community has access to are the redacted versions.

360. MEG's submission noted:

Because the information is redacted, MEG is not able to say with certainty what the information would have shown. Insofar as the redacted information can be understood in context, we consider that the majority of the redactions could not be validly sustained on the basis of commercial-in-confidence interests because they relate to the site location and contamination levels of the spoil.

Many of the redactions appear [to] relate to information about the contamination levels of the spoil and potential human health and environmental impacts. Such information was directly relevant to community concerns about the approval decision.

361. MEG also stated that while the EPA's second approval decision for the MBC site acknowledged correspondence about threatened species on the site, it did not adequately address the ecological concerns it had raised in its legal proceedings about the Growling Grass Frog.

362. MEG said the 2021 EMP incorrectly concluded it was unlikely Growling Grass Frogs were on the site, despite the Department records and the Victorian Biodiversity Atlas showing the presence of the frogs in February 2021. MEG noted redactions in the report prevented it knowing whether the Growling Grass Frog habitat area is at risk of disturbance.

363. The investigation notes that despite receiving legal advice on 1 December 2020 that any future approvals should directly address the matters raised by MEG and BMG in their submissions, the EPA's 2021 approval of the MBC proposal did not refer or respond to BMG's concerns about the proposal's impact on the rights of the child.

364. It is also worth noting that material on the EPA's website stated it would seek consent to publish unredacted documents after the disposal site was chosen. However, as of the date of this report, the available EMPs and Assessment Reports remain redacted.

365. MEG brought separate legal proceedings against the EPA about the procedural fairness afforded to it as part of the process. On 21 March 2022, the proceedings were finalised by consent between the parties. This investigation makes no comment on the matters that were the subject of these proceedings.

Hi-Quality site chosen in June 2021

366. On 25 June 2021, following the John Holland Consortium's recommendation, Hi-Quality's Bulla site was selected to receive spoil from the WGTP.

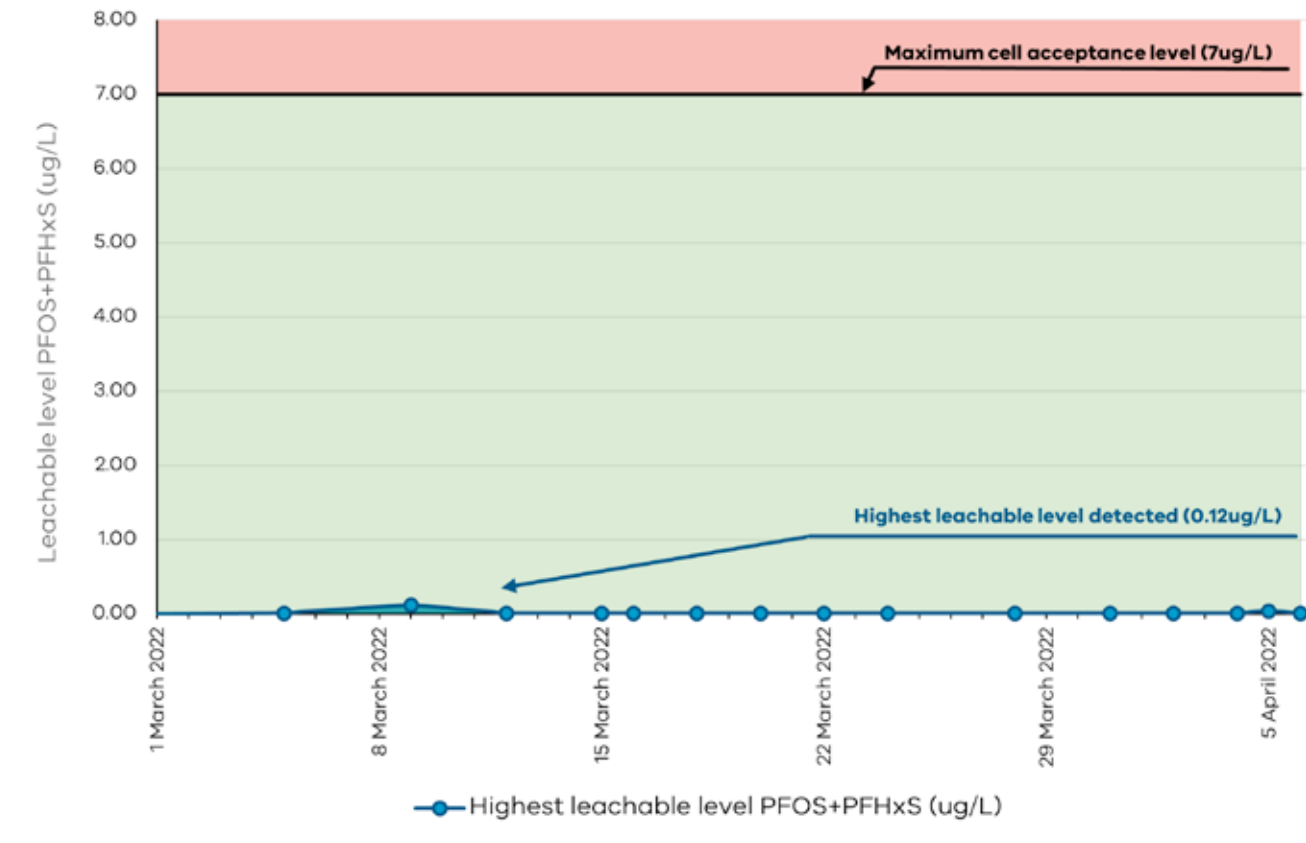
367. The statement on Hi-Quality's website read:

Hi-Quality Group in Bulla will be the preferred site to collect, treat and dispose of the material excavated by the tunnel boring machines on the West Gate Tunnel Project.

Our site design for managing the material excavated from the West Gate Tunnel Project addresses many of the concerns raised by the community, including using hard-stand and leach-proof lining on the containment bays, installing a globally recognised water treatment plant, and using robust lining in the containment cell.

368. Hi-Quality also said that before beginning any works, it would reach out to the community to provide information. It said the first stage of construction would take six to seven months, after which Hi-Quality would begin to receive WGTP spoil, with a peak of 425 trucks expected each day.
369. Hi-Quality acknowledged community concerns and stated its intention to hold an 'ongoing dialogue' with community representatives to understand and respond to them. However, community concerns persist.
370. Sunbury Says No also said the EPA failed to appreciate the impact of the decisions on residents, instead acting on behalf of the Government and private business.
371. It said the EPA did not hold any community engagement sessions or release information vital to the best interests of the community, noting:
- we have seen the EPA issue and quash EMP's without any consultation and we believe as a community that as a minimum they should have actively engaged with us.
372. The group noted that without changes made by the TBM Regulations, the Hi-Quality site could not have been approved:
- The Environment Minister made changes to environmental regulation with significant changes to the distance this spoil processing site could be built near sensitive property, including homes. The project wouldn't have been able to be approved if this legislation wasn't changed and if the ... Act remained in place and tunnel boring spoil amendment [was] not made, this spoil project would not have proceeded in its current location.
373. Sunbury Says No raised concerns the longer-term impacts of the decision may not be evident for a decade or more.
374. The group described the value of its advocacy as highlighting:
- proximity to housing, creeks and waterways, endangered plant and animal species that would be all but wiped out, the increase in traffic noise that will be generated by this proposal including the mental health concerns that will be generated from this project ... We have highlighted the ongoing community outrage and concern about such volumes of contaminated spoil being brought into our community ... A community must be consulted about such a significant project being undertaken in their community.
375. The Hi-Quality EMP described how the WGTP spoil would be sampled on arrival at the Hi-Quality site. This would confirm, for the first time, the total and leachable PFAS levels in the spoil as previous samples only tested the groundwater. The EPA has committed to making the spoil test results public.

Figure 8: Spoil testing results to 6 April 2022



Source: EPA website

376. In March 2022, the Hi-Quality site began receiving the WGTP spoil and from April 2022 the EPA began publishing spoil test results on its website. Between 5 March and 6 April 2022, the maximum reported leachable level of PFAS was 0.12 micrograms per litre, which is well below the maximum acceptable level of 7 micrograms per litre. This is consistent with the low levels the Executive Director expected.

377. On its website the EPA noted testing is extensive and stated:

EPA is authorised to attend and conduct testing at any time. The frequency will change throughout the project and depend on the observations made by the officers during the inspections. Initially, while the process of soil management is being established on-site EPA will have a greater presence. Then depending on the compliance with the EMP, these may decrease. EPA visits to the site are unannounced and randomly timed to ensure officers observe the true state of the site during the inspection.

378. The EPA has also begun a series of monthly information sessions with community members near the Hi-Quality site.

The 2017 Act and waste management for future infrastructure projects

379. The EPA told the investigation its role in managing waste disposal for the WGTP was limited by the proposals put forward by the John Holland Consortium and landfill operators. This understanding of its role, described by the Executive Director as 'reactive', manifested in several problematic ways from the community's point of view.
380. First, although the EPA considered the John Holland Consortium's sampling in the tunnel alignment to be insufficient, the EPA did not direct the Consortium or landfill operators to conduct more testing. Instead, the EPA had to make broad assumptions about spoil contamination levels. This created uncertainty about how much PFAS is actually in the spoil.
381. Second, although the EPA's preference under the waste hierarchy was for the spoil to be reused, it could not direct or compel the John Holland Consortium or landfill operators to manage the waste in this way. It depended on the Consortium or landfill operators to propose a genuine reuse option in order to approve one. This increased community confusion because the EPA stated some of the spoil might be safe enough for reuse but ultimately approved disposal to containment cells at landfill sites.
382. The investigation notes that the 2017 Act has significantly changed the way the EPA manages waste. As well as introducing a general environmental duty, there are now specific waste duties and controls that apply to anyone generating, receiving and transporting waste.
383. The different types of waste are now pre-classified and consolidated, rather than in separate regulations and guidelines. PFAS is now listed as a pre-classified waste and the EPA has issued a designation simplifying the management of soil with very low levels of PFAS.
384. As well as licences, there are two new levels of permission under the 2017 Act rather than one, as under the 1970 Act. This allows the EPA to use a compliance tool appropriate to the proposal, including attaching risk-specific conditions.
385. The 2017 Act also grants broad powers to the EPA to require whatever information it sees fit from an operator when considering an application for a permission. The EPA can also grant a permission subject to conditions, which it may apply at its own discretion. Notably, these include 'the monitoring, testing or analysis of any impacts of engaging in the ... activity'. This could include further soil testing.
386. While the 1970 Act gave the EPA a broad authority to request further information and apply conditions when considering works approvals and licences, the new Act provides more specific grounds on which it could do this to satisfy itself waste is being managed to prevent and reduce harm to the environment.
387. Whether these new tools will be used effectively by the EPA when managing waste from future infrastructure projects remains to be seen.
388. However, the EPA has publicly committed to using its new powers to prevent any potential future harms. In a statement on website, the EPA's current Chief Executive Officer stated:
- One of the things that's important to remember is under the new laws, right and wrong doesn't change. And if you do things that will cause harm to our environment or cause harm to our communities, then we've got new powers and new sanctions to hold you to account.

Compliance with environment principles and human rights

389. The EPA told the investigation the principles of environment protection were embedded in the approvals process and the principle of accountability was met by placing the EMP Assessment Reports on its website.

390. While the application of the principles is not specifically explained in any of the EMP Assessment Reports, the investigation is satisfied the EPA adequately considered the following principles of environment protection in its 2020 and 2021 EMP decisions:

- As approval of the EMPs required a decision about whether the proposals were the most appropriate and proportionate management of the TBM spoil, the EPA had regard to the **principle of integration of economic, social and environmental considerations**.
- **The principle of wastes hierarchy** was given consideration by the EPA when it issued classifications to the John Holland Consortium requiring them to explore reuse options. By supporting an option that diverted the waste from existing landfills, the EPA's approach also allowed for future PFAS treatment options if they become available.
- The EPA considered **the precautionary principle** by undertaking a detailed interrogation of the technical specifications and ensuring the designs met the requirement of containing PFAS to a level of 7 micrograms per litre.
- The EPA's consideration of the **principle of integrated environmental management** was also demonstrated through the risk assessments it did on matters such as leachate risks.

- The **principle of intergenerational equity** was most likely a consideration in the EPA's assessment of the technical specifications of the containment cells. The investigation notes that, given the community concerns about the possible long-term impacts of PFAS in the environment, it would have been preferable for the EPA to explicitly address this principle in its EMP Assessment Reports.

391. While the investigation accepts that the EPA generally met the **principle of accountability**, there were significant shortcomings in how it engaged with affected communities.

Principle of accountability and community consultation

392. The 1970 Act states members of the public should be given:

- access to reliable and relevant information in appropriate forms to allow a good understanding of environmental issues
- opportunities to participate in policy and program development.

Access to information in an appropriate form

393. The Executive Director, decision maker for the 2020 EMP decisions, said:

I think accountability was achieved through the incredibly robust report that we produced and the level of technical analysis and so forth in putting that out into the public domain, albeit redacted which we couldn't control unfortunately. I think that meets the accountability requirement.

394. While the EPA provided access to some general information about PFAS on its website before the EMP decisions were made and to redacted copies of its technical EMP Assessment Reports after, it is clear community groups did not consider this information accessible or useful.

395. All of the groups complained about the flow of information regarding the TBM Regulations and the EMP approvals process.

396. Bacchus Marsh Grammar said:

BMG was continually required to prompt the EPA for further clarification around the Proposal and would often face inordinate delays in response. Even then, many of the responses received from the EPA were significantly redacted ... or vague and seemed to suggest that the Decision was going to be made in favour of the WGTP joint venturers regardless of any of BMG'S concerns.

397. The school ultimately resorted to the Freedom of Information ('FOI') process:

BMG was asked to submit FOI requests to the EPA to obtain documents which, in our opinion, were crucial to our understanding of the dangers to the health and wellbeing of our students and staff. When our FOI requests were submitted, however, we were often met with resistance and multiple impermissible delays (sometimes of up to 6 months) in having our requests fulfilled. So severe were the delays in relation to one of our requests that we were prompted to lodge a complaint with the Office of the Victorian Information Commissioner.

398. BMCC described the quality of responses received from the EPA as:

cut and paste responses with links to the West Gate Tunnel website or from [the Department]

399. BMCC also explained the importance of receiving information in an appropriate form, noting the documents provided by the EPA increased the community's existing fears.

400. MEG explained the impact of the EPA's approach:

the EPA's failure to provide information or consult the community caused significant community unrest and concern. The heavily redacted approval documents only served to inflame concerns.

401. Most of the groups said the absence of information escalated the fear and anxiety in the community. One submission to BMCC said:

I could not sleep for weeks with worry that the soil was going to be so close not only to my children but to all of Bacchus Marsh

"I could not sleep for weeks with worry that the soil was going to be so close."

– Bacchus Marsh Community Coalition

402. Hume City Council told the investigation the strong community reaction from people who felt they had no other complaint avenue placed a burden on its resources:

The impacts of assessing and managing community concerns with the development has been considerable on Council, particularly where the local community was unable to exercise any voice in the decision.

Significant senior officer time and budget has been invested in responding to the proposal.

403. Several groups told the investigation they lost trust in the EPA as the environmental regulator. For example, MEG said:

The enduring implications of the EPA's handling of the matter is the complete removal of trust in the EPA, its statements, communications, and intentions as an independent authority. Throughout this process, the EPA has created a reputation as a deceitful and treacherous organisation that will readily put short-term political and commercial interest ahead of its statutory duties as a regulator of human and environmental health

“The EPA has created a reputation as a deceitful and treacherous organisation that will readily put short-term political and commercial interest ahead of its statutory duties.”

– Moorabool Environment Group

404. MEG stated the EPA's actions indicated it saw its role as 'facilitating the interests and secrecy of corporate entities'. It said the group would likely interact less with the EPA as a result. This is significant given MEG has a history of constructively engaging with the EPA.

405. BMG similarly questioned the EPA's independence:

The EPA's engagement with BMG was tokenistic at best, and at times we queried whether the EPA was representing the WGTP Joint Venture multinationals rather than fulfilling its role as an independent regulator.

Such failures have seriously and irreparably undermined the faith of the BMG community (and the broader Bacchus Marsh community) in the EPA to act in the best interest of the community as the state's environmental regulator.

406. Letters submitted by community members to BMCC raised similar concerns, alleging the EPA's intention seemed to be to 'curry political favour' and 'serve as the mouthpiece' for government agendas.

Opportunities to participate

407. The community groups expected to be actively consulted by the EPA; however, the EPA saw this as the role of the John Holland Consortium. The CEO stated:

I think with a major project like this, major projects need to do consultation themselves for the broader project, I think that's pretty normal ... Even where the EPA is initiating some kind of consultation, we really encourage duty holders to run that, to initiate that ... as part of establishing their social licence to operate. So again, you know, many other processes, we encourage duty holders to initiate those kind of conversations.

408. The Executive Director made similar comments:

We would always require that the proponent undertake their own consultation, and really in order to achieve fast-track, that's what we were looking for is that the proponent was undertaking their own ... consultation. After all, these developments are owned by a proponent, they are not the EPA's developments. Neither is the waste the EPA's waste. So, we always put those matters back to the proponent to undertake their own consultation.

409. Some attendees of community consultation forums run by the landfill operators expressed dissatisfaction with the session structure, the information provided, and the lack of EPA representation.

410. A Bacchus Marsh resident said:

We were appalled at the apparent community consultation. The only “so called consultation” didn’t even have anyone from the EPA there! ...

We attended one of the sessions and came away feeling more confused and more frightened about our future in Bacchus Marsh.

411. Another submission summarised the consultation as:

... very frankly an exercise in rage mitigation. The consultation was organised with little notice on a weeknight, permitted only small groups who had to book tickets and had limited time for the consultation period. Numerous questions were deflected and eventual responses promised which never eventuated. At no point were the levels of contamination in the soils made public as all the test results were “commercial in confidence”.

412. Both the Executive Director and CEO acknowledged the EPA was aware of the community concern about PFAS.

413. In deciding whether to approve the EMPs, the EPA was able to call a meeting with interested parties under section 20B of the 1970 Act. Asked whether the EPA considered consulting with the community directly, the Executive Director told the investigation the EPA did not hold a section 20B conference as the risk profile of the project was considered low:

the consideration around consultation really is risk, right, environmental risk, and I’ve been at pains to ... point out the risk associated with this proposal was just about zip. There is no risk to human health ... So, I think we could have invoked a 20B conference. I did not see the point in doing that, did not see the value in doing that, but we did make sure we had an incredibly robust multiple thousands of pages worth of attachments, analysis for this proposal for an environmental and human health point of view.

“There is no risk to human health ... I did not see the point in doing that [a section 20B conference with the community].”

– Former Executive Director, EPA

414. The CEO also expressed the view that because PFAS was a ‘lightning rod’ for ‘strong views’, the EPA’s focus was on explaining the science, noting in matters of ‘environmental outrage’ it is ‘tricky to cut through with facts’.

415. Asked whether it would have been beneficial to conduct a section 20B conference to share information with the community, the Executive Director said:

with the benefit of hindsight, we could have had a 20B. It would have been a complete waste of time, that’s my opinion.

416. He explained the EPA had attempted to engage with locals and met with some of the community groups early on, but there was ‘no way to have a fruitful discussion when there was that level of anger in the community’. The EPA instead took the approach of ‘putting factual information on the website’.

417. However, when asked about lessons learned, the Executive Director acknowledged the benefits of engagement, noting:

I think earlier intervention in that public discussion around PFAS [and] better intervention is probably a lesson. Because issues can just get out of control in the public domain. They just catch fire.

“I think earlier intervention in that public discussion around PFAS [and] better intervention is probably a lesson. Because issues can just get out of control in the public domain. They just catch fire.”

– Former Executive Director, EPA

418. The Executive Director stated that ultimately the EPA's approach to consultation was consistent with the principle of accountability because it was proportionate to the environmental risk the spoil posed:

I think, it's consistent with the principle of accountability because we focused on protecting human health and the environment from the harmful effects of pollution and waste. And we issued a report saying exactly how that happens and why that happens and ... we've been held accountable for that.

419. Community groups took a differing view, and said the failure by the EPA to respond to their FOI requests and consult with them exacerbated their concerns about risks to health and the environment.

420. The investigation acknowledges that the principle of accountability does not require the EPA to consult members of the public on every decision it makes. Nor does it specify when and how public participation should happen.

421. However, the documents reviewed by the investigation and the Executive Director's and CEO's evidence suggest the EPA's actions served to minimise public awareness of, and participation in, the EMP approval decisions.

422. Experts in community consultation on large projects of this kind suggest Australians traditionally expect input in most areas of public life and resistance to new initiatives often hinges on a failure to adequately consult.

423. The 'not in my backyard' response by communities affected by infrastructure developments is not unexpected. This is especially so when public-private partnerships increasingly deem information to be 'commercial in confidence' often leaving those affected unable to find out what is going on. However, through proper consultation many community concerns can be addressed, and attitudes can be changed.

424. Given the level of community concern about PFAS and the number of groups that contacted the EPA looking to engage in the decision-making process, the EPA should have made a greater and more meaningful effort to consult with the community about the WGTP spoil.

425. In response to a draft version of this report, the EPA said that while it agreed it could have done more to engage with the community, it considered it satisfied the principle of accountability with regard to the 2020 and 2021 EMP approvals as well as the TBM Regulations.

426. The EPA stated the principle of accountability is limited to participation of the public in general policy and program development rather than administrative decision making in individual cases.

427. In June 2021, two months after making the 2021 EMP decisions, the EPA published a Charter of Consultation. The charter was a requirement of section 53 of the new 2017 Act. A draft had been distributed for public comment in September 2019.

428. In the Charter of Consultation, the EPA committed to:

produce accessible information to support public awareness and participation

create opportunities for participation

ensure transparency and recognition of impacts on stakeholder groups and the broader public

report on how people's inputs have been taken into account in decision making.

429. It also identified specific ways consultation can occur, depending on the type of licence or permission sought. These include public notification, information sessions, a conference of interested persons and the appointment of an Advisory Panel to support the decision maker.

430. The investigation notes these enhanced commitments to community consultation would have been operational during the EMP decision-making period, if not for the delayed commencement of the 2017 Act. These commitments had been contemplated for some time, as shown by the draft publicised in September 2019. Despite this, the EPA avoided consulting with concerned communities about the EMP decisions it made in 2020 and 2021.

Human rights

431. Regardless of whether a decision has an obvious impact on a person or groups of people, all Victorian public authorities are required to act compatibly with, and give proper consideration to, relevant human rights in their decision making. This includes environmental decision making.

432. The investigation considers the right to life and the rights of the child were both relevant to the EPA's decisions to approve the EMPs for the three landfill operators in 2020 and 2021. The enjoyment of the right to life could be affected if the decisions resulted in harm to the environment, including to human health. The rights of the child could also be affected because of the persistence of PFAS in the environment and its possible impact on future generations. This was particularly so given the proximity of one landfill site to a school.

Compatibility with human rights

433. The EPA submitted that its approval decisions were compatible with the human rights because the 'low risk of the TBM spoil' eliminated the 'risk to human health', and thereby any 'potential human rights breach'.

434. It said that human health and ecological risk assessments were undertaken, and it was determined that the risk to human health was minimised.

435. The investigation accepts that by adopting a precautionary approach to the management of the spoil, in particular by requiring all landfill operators to safely contain PFAS of ten times the amount likely to be present in the spoil, the EPA's decisions were likely to be compatible with the right to life and the rights of the child.

Proper consideration to human rights

436. However, evidence gathered by the investigation shows the EPA did not give proper consideration, or indeed any specific consideration, to these relevant human rights when making the EMP approval decisions.

437. The Executive Director characterised their engagement with the Charter of Rights Act when making the 2020 EMP decisions as 'cursory', and acknowledged he made no record of their consideration of possible human rights. There is no reference to the Charter of Rights Act being considered in the EMP Assessment Reports.

438. The EPA's CEO was also not aware of how the EPA's decision makers practically considered the Charter of Rights Act in the context of their roles. While the CEO suggested the consideration of human rights was built into the 'culture' of the agency, she could not identify any tangible examples of how this was applied in these decisions.

439. While the EPA stated its 2021 EMP decisions were made 'within the framework of the Charter', this appears to be a retrospective assessment by the agency.

440. The investigation suggests by failing to fully turn its mind to the relevant rights and to explain how it had considered them in its approval decisions, the EPA missed an opportunity to promote its commitment to these rights.

441. Such consideration could also have helped the agency allay the fears expressed by community groups about the perceived impacts of the EMP decisions on their health and quality of life and that of future generations.

442. As previously noted, the development of human rights in international environmental law is emerging. As Victoria's environmental regulator, the EPA should not only foster a culture of awareness of human rights, but genuinely consider and promote relevant rights that arise in its decision making.

443. The EPA said as a result of the investigation, it has undertaken a review of 31 policies and procedures to ensure it acts compatibly with human rights. It advised that there is a prioritised program of work to improve Charter assessments which is expected to be completed by 30 June 2022.

Conclusions about the EPA's approval of the EMPs

444. The pressures on the EPA to 'fix' the issues between the Victorian Government and the John Holland Consortium that resulted in the development of the TBM Regulations flowed onto the EPA's decision making after the TBM Regulations became operational. It is likely this pressure contributed to the legal errors made by the EPA when making the 2020 EMP decisions.

445. Documents show the EPA was aware it did not have the information required under the TBM Regulations when approving the 2020 EMPs, including core details such as leachate management plans and environmental audits.

446. The Executive Director said he thought it was open to him to approve the EMPs on the condition these documents be provided, because he did not consider them essential under the TBM Regulations. However, the EPA has not explained why it did not wait for the information to be provided before approving the EMPs. Nor has the EPA explained when it expected the conditions would be satisfied.

447. The rush to approve the EMPs for the three landfill operators tendering in February 2020 also furthered community groups' perception that the approvals were always going to be made, regardless of the information provided.

448. The EPA approved EMPs for three sites even though only one site was required to receive the spoil. The Executive Director said this was because the John Holland Consortium said it wanted 'three sites with full environmental and planning approvals'. This caused significant concern in all three of the impacted communities of Bulla, Bacchus Marsh and Ravenhall, any of which could have been chosen as the disposal site.

449. In response to a draft version of this report, the Executive Director said community perception that the approvals were a foregone conclusion was not accurate. He advised that the EPA took the 'ordinary level of rigor and care' with the assessments and that each was 'extremely robust, scrutinised by the Chief Environmental Scientist and was the subject of reports and attachments running to thousands of pages'.

450. The EPA shared this view and said its assessment of the EMPs was comprehensive, stating the time pressure was neither remarkable nor meant it failed to independently review the EMPs. It explained its approach was precautionary and it approved the three sites because it received three applications.
451. The investigation accepts the EPA's and the Executive Director's evidence that the assessment of the EMPs was environmentally sound and that the approvals were not a foregone conclusion. However, the EPA's approach to community engagement and failure to be fully accountable for its EMP decisions greatly increased community concern.
452. The investigation does not accept the view that there was no point in it engaging with affected communities, given the high level of concern. 'Lightning rod' issues of significant concern, such as PFAS, require more, rather than less engagement by the environmental regulator. The EPA's view that consultation by the landfill operators was, or could be, an adequate substitution for the EPA's own accountability for its decisions, is problematic given its role as the State's environmental regulator.
453. The investigation finds the actions and decisions of the EPA with respect to the 2020 EMPs were deficient, partly because of the pressure exerted on the EPA to fix the problems facing the WGTP.
454. While the decisions were revoked and remade with the required information, the subsequent decisions did not appear to remedy the level of distrust the EPA's actions created in the affected communities.
455. In response to a draft version of this report, the EPA said it understood the concerns about the lack of consultation and engagement undertaken in respect of the EMP applications, and stated it is 'committed to meaningful engagement with Victorians about improving environmental and human health outcomes'.
456. The EPA ultimately said it recognised the impact its approach had on the community groups and acknowledged comments made to the investigation by BMG, BMCC, MEG, Sunbury Says No and Hume Council about their diminished willingness to engage with the EPA. It said it agreed that 'lightning rod' issues such as PFAS require 'more rather than less' engagement by the EPA, stating:
- We are working hard to rebuild trust, taking a more collaborative and transparent approach to when, how and what we share with the community, based on what the community want and need to be able to participate in public life.
- This work has already started, with monthly community forums now in place with community members near the Bulla Spoil Facility, regular updates on our website and a commitment to share information ... including data from testing.

Overall conclusions

457. The TBM Regulations were developed to solve a contractual issue between the Victorian Government and the John Holland Consortium.
458. While the TBM Regulations may not have reduced the environmental protections when compared to pre-existing permission tools, the impacts of developing and operating under using these new, custom-made regulations were significant.
459. First, it appears the EPA was effectively pressured by the Working Group to assist in the development of bespoke environmental regulations at the behest of a private contractor. The EPA was put under significant time pressure. This resulted in the EPA making legally deficient decisions.
460. There were significant costs and resources involved in:
- developing the TBM Regulations
 - making the 2020 decisions
 - responding to the court proceedings
 - remaking the decisions in 2021.
461. It is also problematic for the EPA as an independent regulator to be so influenced by the MTIA and WGTP. While the disposal of spoil from the WGTP may have been an inter-agency issue, it should not have fallen on the EPA as the regulator to 'fix' the Government's contractual problem. Being influenced by other agencies potentially compromised the EPA's ability to act independently and to decline approvals once the proposals were put to them.
462. Second, the use of the TBM Regulations to approve these proposals left concerned communities in the dark and without recourse to VCAT. Providing reasons for its decision in dense technical reports that were heavily redacted did little to allay community concerns.
463. The EPA could have given greater consideration to the principle of accountability identified in the Environment Protection Act and engaged more effectively with the affected communities. The failure to do so caused social, psychological and financial stress to impacted communities.
464. The available evidence does not suggest the EPA properly considered the Charter of Rights Act when approving the EMPs, with the Executive Director acknowledging it was considered in a ' cursory' way.
465. In response to a draft version of this report, the EPA acknowledged it did not undertake a 'separate consideration process in respect of human rights'. The EPA noted that the principles of environment protection in the 2017 Act sometimes align with human rights. The EPA is already reviewing its policies and procedures and has started an action plan to ensure it properly considers the Charter of Rights Act in future.

Observations

466. The EPA is a science-based regulator, but this is not its only lens. It will never be enough for the EPA to consider only the science underlying a development proposal, without considering the impacts the proposal may have on communities and individual human rights. This is especially so for emerging areas of concern, such as PFAS. The environmental principles themselves reflect this.
467. In response to a draft version of this report, the EPA agreed that science cannot be its only lens, and said while the science provides a 'foundation' to its consideration of risks to people, communities and the environment, it does not limit its focus in this way.

468. The EPA's involvement in the Working Group included requests to meet with landfill operators and Transurban and to provide advice on how changes to environmental standards, such as buffer zones, would impact the likely approval of specific sites. This sort of involvement had the capacity to compromise the EPA's independence as the State's environmental regulator.
469. The EPA said it did not compromise on environmental protections when it assessed the proposals made under the TBM Regulations. It stated it held each landfill operator to a high technical standard by requiring them to contain up to ten times the highest PFAS reading in the groundwater samples.
470. While the EMP Assessment Reports support this position, the 2020 EMP decisions were made without some of the documentation required under the TBM Regulations. This raises questions about how the EPA could have been confident of this position in September 2020, especially given the legal advice it had received about this matter.
471. The Executive Director described the pressure on the Working Group to 'get the tunnel boring machines started and to get on with the project'. He also described how this pressure translated into the EPA being asked to 'hurry up or just fix it or make it go away'.
472. The CEO said the pressure did not impact the EPA's decision making. She said the EPA was merely providing 'factual information' about matters such as whether a landfill levy would apply which 'didn't compromise the substance' of the decisions made.
473. It is nevertheless clear the Executive Director faced pressure to help create the TBM Regulations and then to approve the EMPs.
474. From her own dealings, the CEO would have understood the developing public perception that the approvals were always going to be granted because of the practical and political imperatives involved.
475. Asked what responsibility she accepted as CEO for the errors that were made and the impacts these had on the community, the CEO said that 'it was never a desirable solution or outcome for anyone to experience distress'. Her ultimate explanation for what unfolded was:
- you can't predict what's going to come at you as a regulator. Be it bushfires, pandemic, transformation, big major projects, small little decisions that don't go your way, waste crime, whatever it happens to be ... in an ideal world, sure. You'd be able to predict what's coming, and everything would fit in a box, and, and so on. But it's just not like that as a regulator.
476. The role of the EPA as an independent statutory regulator is no doubt challenging, particularly given the volume of large infrastructure projects underway in Victoria. However, the EPA must be independent and be seen as independent to maintain public confidence in the objectivity of its decisions.
477. This investigation shows that the EPA's communication of decisions via redacted, technical documents, while not necessarily contrary to the principle of accountability in the Environment Protection Act, fell short of reasonable community expectations.

478. Community discontent with the EPA has attracted ongoing media coverage for the past five years. In the decisions reviewed by this investigation, the EPA's failure to meaningfully consult only served to increase community perceptions that the EPA was more concerned with managing the Government's relationship with private companies than engaging with citizens.
479. The EPA told the investigation it did not have the 'resources' to turn around the negative public perception of PFAS that developed around the WGTP. However, the Executive Director said the EPA spent 'hundreds of thousands of dollars' on legal advice about the best way to solve the contractual issues presented by the John Holland Consortium.
480. It was unreasonable for the EPA to adopt the position, as described by the Executive Director, that environmental outrage about PFAS was so great that meeting with the community would have been a 'waste of time'. As a result of this approach, councils and community groups were left to make fruitless FOI requests, and then start legal action to try and get some clarification of how the WGTP spoil was to be managed by the EPA.
481. This failure by the EPA to effectively engage with communities on this issue served to significantly undermine the faith they had in the regulator's actions and decisions.

Opinion

482. In light of the above and pursuant to section 23(1)(b) of the Ombudsman Act:

- The EPA's failure to provide appropriate information and opportunities for communities to participate when making its 2020 and 2021 EMP approval decisions was unreasonable.

Recommendations

To the Environment Protection Authority:

Recommendation 1

Review the Environment Protection Authority's approach to community engagement to deal more directly with community concerns.

EPA response:

Accepted.

Recommendation 2

Review the conclusions of the investigation and consider whether further improvements to the Charter of Consultation are warranted.

EPA response:

Accepted.

Recommendation 3

Develop and implement a *Charter of Human Rights and Responsibilities Act 2006* (Vic) assessment procedure for consideration by individual decision makers.

EPA response:

Accepted.

Recommendation 4

Seek consent under the *Environment Protection (Management of Tunnel Boring Spoil) Regulations 2020* (Vic) to publish, and subject to this consent, publish:

- the unredacted 2021 Environment Management Plans submitted by all three landfill operators
- the unredacted 2021 Assessment Reports for all three Environment Management Plans.

EPA response:

Accepted.

EPA response to recommendations

June 2022

EPA's response to Ombudsman's report



EPA welcomes the Ombudsman's report, particularly the acknowledgement all environmental protection requirements were met as part of this project.

In making decisions on Environment Management Plans, EPA was focused on a science driven examination of best environmental and human health outcomes; we would not have approved the plans if we weren't satisfied they met strict conditions to protect human health and the environment. We are proud of our staff's commitment to protecting Victoria's community and environment and their following our legislative process with professionalism and integrity.

We are committed to engaging early, often, respectfully and transparently. Science, evidence and law will always guide our decisions; and we also acknowledge the ongoing need to work with the community to protect human health and the environment.

Any opportunity to review our approach and processes is invaluable. We are focused on continuous improvement and growth in all aspects of our work and thank the Ombudsman and her office for the careful review and consideration of these important issues.

Ombudsman's recommendation	EPA response	EPA comment
Recommendation 1: Review the Environment Protection Authority's approach to community engagement to deal more directly with community concerns.	EPA accepts recommendation 1	<p>EPA has made significant improvements to its community engagement approach and is focused on engaging early, often, and respectfully with those affected by our decisions, seeking to understand their aspirations and concerns. Our final decisions will always be made based on the best available science, our legal responsibilities and the legislative requirements that govern us - and we will be transparent with the community about those reasons.</p> <p>We are working hard to build the trust of the Victorian community, taking a collaborative and transparent approach to when, how and what information EPA shares with the community based on their needs, and listening to the concerns and feedback they provide.</p> <p>As an example of our improved engagement approach in practice, EPA is holding monthly forums with local community members about the Bulla Spoils Facility (the site receiving spoil from the West Gate Tunnel Project under an approved Environmental Management Plan) and provides regular operational updates on its website. EPA is meeting its commitment to the community to share information related to the spoil management process - including spoil</p>

Environment Protection Authority Victoria
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EPA's response to Ombudsman's report



		<p>volumes, data from spoil testing and other items of interest they may wish to explore.</p> <p>Another example of our approach to directly engaging with the local community about their concerns is the response to the recent detergent spill at Cherry Lake near Altona. EPA's scientists and environment protection officers held weekly on-site meetings during the response to the incident and continue to meet directly with interested community members as we move through the recovery phase.</p>
<p>Recommendation 2:</p> <p>Review the conclusions of the investigation and consider whether further improvements to the Charter of Consultation are warranted.</p>	<p>EPA accepts recommendation 2</p>	<p>As a result of new legislation and a new operating model to support its effective implementation, EPA has been considering ways to further strengthen its Charter of Consultation, to ensure the sharing of information with the community and stakeholder is robust, effective and two way - particularly when it comes to the important issues of protecting the environment and human health.</p> <p>This review will be completed by the end of 2022.</p>
<p>Recommendation 3:</p> <p>Develop and implement a Charter of Human Rights assessment procedure for consideration by individual decision makers.</p>	<p>EPA accepts recommendation 3</p>	<p>EPA has always considered human rights as part of the environmental and human health assessments that underpin our regulatory decision-making. However, we acknowledge there was no consistent, standalone process for demonstrating consideration of the Charter.</p> <p>We have strengthened our approach to this and are now formally addressing and documenting Charter considerations in our decision-making processes, proportionate to the nature and scope of the decision and the Charter rights engaged. For example, a recent pollution issue necessitated the relocation of a family due to vapour intrusion. A thorough Charter assessment was undertaken and documented to inform our approach.</p> <p>We have also carried out a comprehensive review of the policies and procedures governing all areas of regulatory decision-making to identify and resolve any gaps in consideration of the Charter in our decision-making processes and have engaged the Victorian Human Rights and Equal Opportunity Commission to assist us. This program will embed systematic and documented consideration of the Charter for all regulatory decisions.</p>

EPA's response to Ombudsman's report



<p>Recommendation 4:</p> <p>Seek consent under the Environment Protection (Management of Tunnel Boring Spoil) Regulations 2020 (Vic) (TBM Regulations) to publish, and subject to this consent, publish:</p> <ul style="list-style-type: none"> the unredacted 2021 EMPS submitted by all three landfill operators; the unredacted 2021 Assessment Reports for all three EMPS. 	<p>EPA accepts recommendation 4</p>	<p>EPA has previously sought the consent of Hi-Quality Products Pty Ltd and Western Soil Treatment Pty Ltd, in relation to the publication of less redacted versions of their 2021 EMPS and the Assessment Reports.</p> <p>In line with the TBM Regulations, EPA will seek consent to publish wholly unredacted versions of each of the three EMPS and the Assessment Reports from the relevant entities.</p>
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Appendix 1: The investigation

Authority to investigate

483. The Ombudsman's jurisdiction to investigate any administrative action taken by or in an authority is derived from section 13 of the *Ombudsman Act 1973* (Vic).

484. Section 13(2) of the Ombudsman Act provides the Ombudsman the power to enquire into and investigate whether an administrative action is incompatible with a human right set out in the Charter of Rights Act.

485. This investigation was commenced under section 16A(1) of the Ombudsman Act which provides 'the Ombudsman may conduct an own motion investigation into any administrative action taken by or in an authority'.

486. The EPA is an authority within the meaning of section 2(1)(bb) of the Ombudsman Act, being a 'public body'. It is a 'public statutory body', as 'a body, whether corporate or unincorporated, that is established by or under an Act for a public purpose'.

How we investigated

487. On 21 July 2021, the Ombudsman notified the following of her intention to investigate this matter:

- Minister for Energy, Environment and Climate Change, Hon Lily D'Ambrosio,
- Board Chair of the EPA, Professor Kate Auty
- Chief Executive Officer of the EPA, Lee Miezis

488. The investigation involved:

- examining relevant legislation including:
 - o *Environment Effects Act 1978* (Vic)
 - o *Environment Protection Act 1970* (Vic)
 - o *Environment Protection Act 2017* (Vic)
 - o *Environment Protection (Management of Tunnel Boring Machine Soil) Regulations 2020* (Vic)
 - o *Environment Protection Regulations 2021* (Vic)
 - o *Subordinate Legislation Act 1994* (Vic)
 - o *Charter of Human Rights and Responsibilities Act 2006* (Vic)
 - o *Environment Protection (Industrial Waste Resource) Regulations 2009*
- examining EPA policies, procedures and guidelines relevant at the time including:
 - o EPA Publication 1928: *Draft Charter of Consultation* September 2019
 - o EPA Publication 1928: *Charter of Consultation* June 2021
 - o *Industrial Waste Resource Guideline 600.2: Waste Categorisation*
 - o *Industrial Waste Resource Guideline 621: Soil Hazard Categorisation and Management*
 - o EPA Publication 1565: *Guideline on the Application of the Environment Protection Principles* June 2014
 - o EPA Publication 1669.1: *Interim position statement on PFAS* November 2017
 - o EPA Publication 1669.4: *Interim position statement on PFAS* October 2020

- o EPA Publication 1799: *Permissions Scheme Policy* 2021
- o EPA Publication 1756.2: *Summary of new Waste Framework* May 2021
- o Australian Government Guidance: *enHealth Guidance Statements on per- and poly-fluoroalkyl substances* June 2019
- reviewing technical reports:
 - o 9 May 2017 Impact Assessment Contaminated Soil and Spoil Management prepared by Golder Associates
 - o 7 June 2019 WGTP Conceptual Site Model of Ground to be Tunnelled prepared by Aurecon Jacobs Joint Venture
 - o 2 September 2020 SAQP for Waste Categorisation for Tunnel Spoil prepared by Agon Environmental
 - o November 2017 West Gate Tunnel Project Assessment under *Environment Effects Act 1978* prepared by Minister for Planning
 - o January 2018 the PFAS National Environmental Management Plan issued by the national Heads of EPA ('HEPA') Version 1.0
 - o January 2020 the PFAS National Environmental Management Plan issued by the national Heads of EPA Version 2.0
 - o Environment Protection Regulations Regulatory Impact Statement August 2019 (Deloitte)
- reviewing EMPs submitted by:
 - o Hi-Quality Quarry Products Pty Ltd
 - o Maddingley Brown Coal Pty Ltd
 - o Cleanaway Operations Pty Ltd
- reviewing 2020 and 2021 EMP Assessment Reports (redacted and unredacted) prepared by the EPA
- reviewing emails sent and received by the EPA and DELWP about:
 - o the development of the *Environment Protection (Management of Tunnel Boring Machine Spoil) Regulations 2020*
 - o the decisions to approve the EMPs
- seeking and considering the views of Hume Shire Council and community groups:
 - o Bacchus Marsh Community Coalition
 - o Bacchus Marsh Grammar
 - o Moorabool Environment Group
 - o Sunbury Against Toxic Soil
- inspecting relevant Supreme Court files and case law including:
 - o *Environment East Gippsland Inc v VicForests* [2010] VSC 335 (11 August 2010)
 - o *Mount Atkinson Holdings Pty Ltd v Landfill Operations Pty Ltd*
 - o *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560
- reviewing other policies, procedures, and guidelines including:
 - o Department of Justice and Regulation's Good Practice Guide Managing Complaints Involving Human Rights, May 2017
 - o Timeline of Developments in PFAS Regulation
- reviewing international guidance material including:
 - o United Nations Human Rights Council Resolution 48/13
- inspecting accessible parts of the Hi-Quality site in Bulla and the Bulla Bridge on 4 August 2021.

489. Two people were interviewed as part of the investigation:

- Former Chief Executive Officer, EPA
- Former Executive Director – Regulatory Standards, Assessments & Permissioning, EPA

Procedural fairness

490. The investigation was guided by the civil standard of proof, the balance of probabilities, in determining the facts of the investigation, taking into consideration the nature and seriousness of the matters examined, the quality of the evidence and the gravity of the consequences that may result from any adverse opinion.

491. This report includes adverse comments about the EPA. In accordance with section 25A(2) of the Ombudsman Act, the investigation provided the EPA, with a reasonable opportunity to respond to the material in the report. The report fairly sets out the EPA's response.

492. Sections of this report refer to legal advice obtained by the EPA, which was provided to the Ombudsman in accordance with section 18K of the Ombudsman Act. The EPA informed the Ombudsman it has not waived any privilege attaching to the advice.

493. In accordance with section 25A(3) of the Ombudsman Act, any other persons who are or may be identifiable from the information in this report are not the subject of any adverse comment or opinion. They are named or identified in the report as the Ombudsman is satisfied that:

- it is necessary or desirable to do so in the public interest, and
- identifying those persons will not cause unreasonable damage to those persons' reputation, safety or wellbeing.

Victorian Ombudsman's Parliamentary Reports tabled since April 2014

2021

Investigation into decision-making under the Victorian Border Crossing Permit Directions
December 2021

Investigation into allegations of collusion with property developers at Kingston City Council
October 2021

The Ombudsman for Human Rights: A Casebook
August 2021

Councils and complaints – A good practice guide 2nd edition
July 2021

Investigation into good practice when conducting prison disciplinary hearing
July 2021

Investigation into Melton City Council's engagement of IT company, MK Datanet Pty Ltd
June 2021

Investigation into how local councils respond to ratepayers in financial hardship
May 2021

Investigation into the Department of Jobs, Precincts and Regions' administration of the Business Support Fund
April 2021

Outsourcing of parking fine internal reviews – a follow-up report
March 2021

Investigation of protected disclosure complaints regarding the former Principal of a Victorian public school
February 2021

2020

Investigation into the detention and treatment of public housing residents arising from a COVID-19 'hard lockdown' in July 2020
December 2020

Investigation into complaints about assaults of five children living in Child Protection residential care units.
October 2020

Investigation into corporate credit card misuse at Warrnambool City Council
October 2020

Investigation into review of parking fines by the City of Melbourne.
September 2020

Investigation into the planning and delivery of the Western Highway duplication project
July 2020

Ombudsman's recommendations – third report
June 2020

Investigations into allegations of nepotism in government schools
May 2020

Investigation of alleged improper conduct by Executive Officers at Ballarat City Council
May 2020

Investigation into three councils' outsourcing of parking fine internal reviews
February 2020

2019

Investigation of matters referred from the Legislative Assembly on 8 August 2018

December 2019

WorkSafe 2: Follow-up investigation into the management of complex workers compensation claims

December 2019

Investigation into improper conduct by a Council employee at the Mildura Cemetery Trust

November 2019

Revisiting councils and complaints

October 2019

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